152 U.S. 211

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1001.

ANTON CAHA, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED SEPTEMBER 1, 1893.

(15,385.)

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a *Writ of Error.*

UNITED STATES OF AMERICA, }
District of Kansas. }

The President of the United States of America to the honorable judge of the United States district court, for the district of Kansas, second division, sitting at Wichita, in said district: Greeting:

Because in the records of proceedings, as *b* also in the rendition of the judgment of a plea which is in the United States district court for the district of Kansas second division, sitting at Wichita, in said district, before you, at the regular March term, A. D. 1893, thereof, between The United States of America, plaintiff, and Anton Caha, defendant, wherein the said Anton Caha was convicted of the infamous crime of perjury and sentenced to imprisonment for the term of two years in the United States penitentiary at Lansing, in said district, and whereas a manifest error hath happened, to the great damage of the said Anton Caha, as by his complaint appears, *it*, being willing that the error, if any hath happened, should be duly corrected and speedy justice done to the par*t*ies aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record of proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record of proceedings aforesaid at the office of the clerk of the Supreme Court of the United States, at the city of Washington, in the District of Columbia, and filed therein on or before the 20th day of August, A. D. 1893, to the end that, the record of proceedings aforesaid be inspected, the Supreme Court of the United States may cause further to be done therein to correct that error whatever is right and according to the laws and customs of the United States should be done.

b Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 20th day of June, in the year of our Lord one thousand eight hundred and ninety-three.

Allowed by Jno. A. Williams, judge of the United States district court for the district of Kansas, second division, issued and dated as aforesaid.

JNO. A. WILLIAMS,
Judge of the United States District Court for the District of Kansas, Second Division.

[Seal of District Court U. S., District of Kansas, 1861.]

Attest: J. C. WILSON, *Clerk.*

c [Endorsed:] 963. United States court, district of Kansas, second division. United States of America *vs.* Anton Caha. Writ of error.

d UNITED STATES OF AMERICA,)
District of Kansas, Second Division,) ss:

I, J. C. Wilson, clerk of the district court of the United States, in the district of Kansas, do hereby certify that the above and foregoing writ of error was filed in my office on the 20th day of July, A. D. 1893, and in accordance with the commands thereof I do herewith return transcript of the record in said cause following hereto; and I do hereby certify that the following pages, numbered from 1 to 49, contain a full, true, and complete transcript of the record in said cause as appears of record and on file in my office.

Witness my hand and the seal of said court, hereto affixed this 7th day of Aug., A. D. 1893.

[Seal of District Court U. S., District of Kansas, 1861.]

J. C. WILSON,
Clerk of the United States District Court
for the District of Kansas.

1 In the Supreme Court of the United States of America.

ANTON CAHA, Plaintiff in Error,)
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.)

The United States of America to the above-named defendant and to Joseph W. Ady, United States district attorney for the district of Kansas, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States of America, at the city of Washington, District of Columbia, sixty days from and after the date this citation bears date, pursuant to a writ of error filed in the clerk's office of the United States district court for the district of Kansas, second division, wherein Anton Caha is plaintiff in error and The United States of America is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error —, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Jno. A. Williams, judge of the United States district court for the district of Kansas, this 20th day of June, A. D. 1893.

JNO. A. WILLIAMS,
Judge of the United States District Court
for the District of Kansas.

2 I, the undersigned, J. W. Ady, United States attorney for the district of Kansas and attorney of record for the within-named defendant in error, plaintiff in the original suit and now defendant in error in this cause, hereby accept service of the above and foregoing citation, and waive all further notice or future notice in said cause, this 26th day of June, A. D. 1893.

J. W. ADY,
United States Attorney for the District of Kansas.

Endorsed: 963. *Supreme* court of the United States, district of Kansas. Anton Caha, plaintiff in error, *vs.* The United States of America, defendant in error. Citation. Filed June 20th, 1893. J. C. Wilson, clerk.

3 In the United States Court for the District of Kansas, Second Division, Sitting at Wichita, in said District.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
ANTON CAHA, Defendant.

Comes now the defendant, Anton Caha, and, for his assignment of errors herein, specifies the following errors, to wit:

First. That the court trying said cause erred in overruling the demurrer of the defendant to the indictment found and filed against him in said cause, for each and all of the reasons specified in said demurrer to said indictment, to wit:

1. That said indictment does not state facts sufficient to constitute any offence under the laws of the United States.

2. It appears on the face of the indictment that the said court has no jurisdiction of the person of the said defendant nor of the subject-matter of said prosecution.

3. That it appears on the face of the said indictment that said offence was not committed at any place within the jurisdiction of this court; and,

4. That it appears upon the face of such indictment that the offence attempted to be charged therein is and was barred by the statute of limitations at the time of the finding of said indictment.

Second. The defendant further assigns as error the action of the court in overruling the defendant's motion for a verdict, filed in said cause during the trial thereof, for the reasons stated in said motion for said verdict, as fully set out in the bill of exceptions in said cause.

Third. The court erred in the admission of certain testimony offered on the trial of said cause on behalf of the plaintiff, to wit:

4 "*Affidavit to be Filed Before Contest of Homestead Entry.*

UNITED STATES LAND OFFICE,
KINGFISHER, I. T., *May* —, 1889.

Personally appeared before me, —— ——, — of that land office, Kingfisher, I. T., Thomas Burch, of Oklahoma, Indian Territory, who upon his oath says:

That he is well acquainted with the tract of land embraced in the homestead entry No. 105, made April 24, 1889, northwest quarter of section 12, in township 11 north, of range 5 west. Anton Caha entered the territory known as Oklahoma, I. T., prior to 12 o'clock noon of the 22nd day of April, A. D. 1889, in violation of

the act of Congress of March 2nd, 1889, and the President's proclamation of March 23rd, 1889, opening said lands to settlement, and in consequence of his violation of said act of Congress and the proclamation of the President made in pursuance thereof forfeited his rights to enter any of the lands declared open to settlement in Oklahoma, Indian Territory; that on the date of said homestead entry aforesaid said affiant was the only prior *bona fide* settler residing upon and improving said tract of land; that affiant is the only *bona fide* prior legal settler upon said tract; that on the 22nd day of April, 1889, at — minutes past 12 o'clock of said day, said affiant made a personal settlement upon said tract; that affiant is a legal, qualified homestead entryman, as more fully appears from his homestead application and affidavits thereto attached, and this the said contestant is ready to prove at such time as may be named by the register and receiver for a hearing in said cause, and he therefore asks to be allowed to prove said allegations; that said homestead entry No. 105 may be declared cancelled and forfeited to the United States, he, the said contestant, paying the expenses of such hearing on his own behalf, and that by virtue of his prior legal settlement and his disqualifications of said homestead entryman he be allowed to enter said tract of land under his homestead application hereto attached.

THOMAS BURCH.

Sworn — and subscribed this day and year above written.

J. C. ROBERTS, *Register.*

Also appeared, at the same time and place, Christian Johnson, and who, being duly sworn, deposes and says that *they are* acquainted with the tract described in the within affidavit of Thomas Burch, and know from personal observation that the statements therein contained are true.

CHRISTIAN JOHNSON.

Sworn to and subscribed this 9th day of May, 1889.

J. C. ROBERTS, *Register.*

Endorsed: Affidavit of contest of Thomas Burch *vs.* H'd No. 105, by Anton Caha. $6.00 p'd. U. S. land office, 1 p. m., May 9, 1889, Kingfisher, Oklahoma."

5 Fourth. The court erred in admitting in evidence a certain notice of contest in words and figures following, to wit:

"(4–345.)

U. S. LAND OFFICE,
KINGFISHER, INDIAN TER., *October* 22, 1889.

Complaint having been entered at this office by Thomas Burch, of Oklahoma City, I. T., against Anton Caha for violating the act of March 2nd, 1889, and the President's proclamation of March 23rd, 1889, and alleging that said Thomas Burch was the first

actual settler thereon on homestead entry No. 105, dated April 24th, 1889, upon the northwest quarter of section 12, township 11 north, of range 5 west, in Oklahoma, Indian Territory, with a view of the cancellation of said entry, and said parties are hereby summoned to appear at Kingfisher U. S. land office, at Kingfisher, I. T., on the 2nd day of December, 1889, at 9 o'clock a. m., to respond to and furnish testimony concerning all the allegations in said affidavit of contest filed by said Thomas Burch *v.* said Anton Caha.

J. V. ADMIRE, *Receiver.*

NOTE.—The fact and date of service upon the homestead settler should be endorsed on said notice.

* * * * * * *

I, Anton Caha, hereby waive all service of summons in this case named in the within notice and enter my appearance in said case, and waive all defects, if there are any, in the issuance of said notice.

Dated this 22nd day of October, 1889.

ANTON CAHA,
By J. W. McLOUD,
His Attorney."

Fifth. The court erred in not requiring proofs of the authority of the register and receiver of the land office to hold, to hear, try, and determine the proceedings to contest the homestead entry of this defendant and to administer oaths to witnesses on said hearing.

Sixth. The court erred in giving to the jury in said cause a certain instruction; which said instruction is in words and figures following, to wit:

"GENTLEMEN OF THE JURY: The court instructs you that as a matter of law the register and receiver of the land office at Kingfisher, either or both of them, were duly authorized to administer oaths to witnesses upon the hearing of such contest, and were duly authorized and empowered by the laws of the United States to administer the oath alleged to have been administered to the
6 said defendant, Anton Caha, upon said hearing of said homestead contest."

Seventh. The court erred in overruling the defendant's motion in arrest of judgment filed in said cause.

Eighth. The court erred in pronouncing judgment on this defendant on the verdict found by the jury in said cause.

Ninth. Upon the record of said cause it does not show that the defendant was properly proceeded against, and that the defendant did not have a fair and impartial trial to the jury of his peers or was present during the trial or any portion of the same.

Tenth. The evidence as set out is insufficient to warrant in law a conviction of said defendant.

HENRY E. ASP,
J. W. SHARTEL,
J. R. COTTINGHAM, AND
GEORGE GARDNER,
Attorneys for Defendant.

Endorsed: 963. United States court, district of Kansas, second division. United States of America *vs.* Anton Caha. Assignment of errors. Filed June 29th, 1893. J. C. Wilson, clerk.

7 UNITED STATES OF AMERICA, }
District of Kansas, } *ss:*

Be it remembered that at a term of the district court of the United States of America in and for the district of Kansas begun and held at Wichita, in said district, on Monday, the 12th day of September, A. D. 1892, the grand jurors of the United States in and for said district come into open court and through their foreman present a certain bill of indictment; which bill of indictment is in the following words and figures, to wit:

8 THE UNITED STATES OF AMERICA, }
District of Kansas, } *ss:*

In the District Court of the said United States in and for the said District, September Term, 1892.

THE UNITED STATES OF AMERICA }
vs. } Indictment for Perjury.
ANTON CAHA. }

(Whose more full Christian name is unknown.)

At the term of the district court of the United States of America in and for the said district of Kansas begun and held at Wichita, in said district, on the fifth day of September, in the year of our Lord one thousand eight hundred and ninety-two, the grand jurors of the United States of America, duly impaneled, sworn and charged to inquire of offenses committed within that part of the Indian Territory lying north of the Canadian river, and east of Texas and the one hundredth meridian, not set apart and occupied by the Cherokee, Creek and Seminole Indian tribes, upon their oaths do find and present, that at and within that part of the public domain acquired by the United States of America by the act of Congress approved March 2, 1889, commonly known as Oklahoma, and being a part of the district of Kansas, on the 3d day of January, in the year of our Lord one thousand eight hundred and ninety, at that part of the district of Kansas aforesaid, the same being a place and district of country under the exclusive jurisdiction of the United States and within the jurisdiction of this court, in the United States land office at Kingfisher, in said part of the district of Kansas aforesaid, of which said land office J. V. Admire was then and there the duly appointed, qualified and acting receiver, and J. C. Roberts was then and there the duly appointed, qualified and acting register of said land office, a certain land contest and cause was pending and then and there came on to be tried, wherein one Thomas Burch having before that time, to wit, on the 9th day of May, 1889, filed his affidavit of contest in said land office, wherein he, the said Thomas Burch, contested the homestead entry of one Anton Caha

to the northwest quarter of section twelve, in township eleven north, of range five west of the Indian meridian, which said land then and there laid within the jurisdiction of the Kingfisher land-office district, and within the jurisdiction of the register and receiver of said land office at Kingfisher, and sought to have the homestead entry of the said Anton Caha, which homestead entry had before that time, to wit, on the 25th day of April, 1889, been filed by the said Anton Caha at the United States land office duly created and located at Kingfisher, in that portion of the district of Kansas aforesaid, canceled and forfeited to the United States, for the reason that he, the said Anton Caha, had made said homestead entry contrary to the laws of the United States and was not entitled to said land; for the reason that he, the said Anton Caha, had violated the proclamation of the President of the United States dated the 23d day of March, 1889.

And the grand jurors aforesaid, upon their oaths aforesaid, do further find and present, that it then and there became and was a material question in said land contest and cause then and there pending in said land office for hearing before the register and receiver of said land office whether the said Anton Caha had entered upon or occupied contrary to law any portion of the lands open to settlement under the acts of Congress approved on the 1st and 2d days of March respectively, in the year of our Lord one thousand eight hundred and eighty-nine, and the proclamation of the President of the United States dated the 23d day of March, in the
9 year last aforesaid, and between said 23d day of March, 1889, and prior to 12 o'clock noon of the 22d day of April, in the year last aforesaid; and thereupon it then and there became necessary and was material, in order to entitle the said Thomas Burch to have the homestead entry of the said Anton Caha aforesaid canceled and forfeited to the United States, that the said Thomas Burch should establish to the satisfaction of the register and receiver of said land office so as aforesaid located at Kingfisher, being the land district in which said land as hereinbefore described lies, the proof of the fact that said Anton Caha had entered upon and occupied contrary to law any portion of the lands opened to settlement under the acts of Congress approved on the 1st and 2d days of March respectively in the year of our Lord one thousand eight hundred and eighty-nine, and the proclamation of the President of the United States dated on the 23d day of March, in the year last aforesaid, and between said 23d day of March, 1889, and prior to 12 o'clock noon of the 22d day of April, in the year last aforesaid; and thereupon it became and was necessary and material, in order to prevent the cancellation of the homestead entry of the said Anton Caha, that he, the said Anton Caha, should establish to the satisfaction of the land office of the United States, and to the satisfaction of the register and receiver so as aforesaid located at Kingfisher, in said district of Kansas, being the land district in which the lands hereinbefore described lie, the proof of the fact that he, the said Anton Caha, had not entered upon and occupied any portion of the lands opened to settlement under the acts of Congress approved on the 1st and 2d

days of March respectively, in the year of our Lord one thousand eight hundred and eighty-nine, and the proclamation of the President of the United States dated the 23d day of March in the year last aforesaid, and between the 23d day of March, 1889, and prior to 12 o'clock noon of the 22d day of April, of the year last aforesaid, said proof then and there being material and necessary to defeat said contest and to prevent the homestead entry of him, the said Anton Caha, from being canceled.

And the grand jurors aforesaid, upon their oaths aforesaid, do further find and present, that Anton Caha then and there was produced as a witness in behalf of Anton Caha in said land contest and cause, and as such witness in said land contest and cause was then and there duly sworn to testify to the truth, the whole truth, and nothing but the truth, in said land contest and cause, by the said J. V. Admire, he the said J. V. Admire, receiver as aforesaid, being then and there duly authorized and empowered under the laws of the United States of America and the regulations of the General Land Office of the United States to administer such oath; and being then and there a witness in said land contest and cause as aforesaid, and being so duly sworn as aforesaid, the said Anton Caha did knowingly, willfully, corruptly and feloniously testify, depose, and swear, among other things, in answer to certain questions material to the matter in issue, then and there first put and asked, in substance and to the effect following, that is to say:

Please describe the appearance, condition, and character of that river (meaning thereby the South Canadian river) as it was on the 22d day of April, as near as you can (meaning thereby the said Anton Caha).

A. The river (meaning thereby the South Canadian river) on the day of the 22 of April, 1889, was just a few days after a large and big raise, and I (meaning thereby the said Anton Caha) think it was gradually falling. The water that we (meaning thereby the said Anton Caha and his party) had crossed on Saturday afternoon was about 40 to 50 ft. wide, I judge, and direct north across the sand bar (meaning thereby the sand bar of the South Canadian river) I should think would be about 250 yds., and the water in the N. channel was about 60 yds. wide, and beyond the water there was still a sand bar of about 100 ft. Direct west from our (meaning thereby the said Anton Caha and his party) camp there was a stream running across the sand bar (meaning thereby the sand bar of the South Canadian river) from S. W. to N. E., and then a sand bar (meaning thereby a sand bar of the South Canadian river) between the N. channel (meaning thereby the north channel of the South Canadian river) and the south channel (meaning thereby the south channel of the South Canadian river), on which we (meaning thereby the said Anton Caha and his party) staid until 12 o'clock noon April 22, 1889.

10 & 11 Whereas, in truth and in fact, the said Anton Caha was not on a sand bar (meaning thereby a sand bar on the south side of the main channel of said South Canadian river) between the north channel and the south channel of the South Canadian river

until 12 o'clock noon of April 22d, 1889, but as a matter of fact he, the said Anton Caha, was at said time within the Oklahoma country; and whereas, in truth and in fact, he, the said Anton Caha, did not stay on the said sand bar on the south side of the main channel of said South Canadian river until 12 o'clock noon of said 22d day of April, 1889, but as a matter of fact he, the said Anton Caha, had entered said Oklahoma country long prior to 12 o'clock noon of the 22d day of April, 1889, and subsequent to the 2d day of March, 1889, and also subsequent to the 23d day of March, 1889; and whereas, in truth and in fact, the said Anton Caha did not enter said Oklahoma country after 12 o'clock noon of the 22d day of April, 1889, but in truth and in fact he, the said Anton Caha had entered said Oklahoma country prior to 12 o'clock noon of the 22d day of April, 1889, and subsequent to the 2nd day of March, 1889, and subsequent also to the 23d day of March, 1889.

All of which the said Anton Caha then and there well knew; all of which statements so falsely made as aforesaid, in answer to the questions aforesaid, were then and there embodied in a written record of said contest, which said written record of said contest was then and there subscribed and sworn to by the said Anton Caha before the said J. V. Admire, receiver of the United States land office at Kingfisher aforesaid; and which said written record of contest was then and there filed with the register and receiver of the United States land office at Kingfisher as aforesaid, and which said testimony as aforesaid constituted part of the record in said contest, and was material matter in and to the said contest and cause so instituted, begun and heard as aforesaid, and was then and there not true, but false, and was then and there by the said Anton Caha not believed to be true, but was then and there by him believed to be false.

And the grand jurors aforesaid, upon their oaths aforesaid, do say, that Anton Caha aforesaid, on the 3d day of January, in the year of our Lord one thousand eight hundred and ninety, at the United States land office so located at Kingfisher *Guthrie*, in the district of Kansas aforesaid, before the said J. V. Admire, receiver of the United States land office located at Kingfisher as aforesaid, in the district of Kansas aforesaid, the said J. V. Admire, receiver of the said United States land office as aforesaid, then and there having such power and authority as aforesaid, by his own act and consent, and of his own wicked and corrupt mind, in manner and form aforesaid, falsely, wickedly, willfully, knowingly, unlawfully and feloniously did commit willful and corrupt perjury, and did then and there, in manner and form and to the effect as aforesaid, testify and swear that all the matters and things hereinbefore specified and set forth were true, when in truth and in fact he, the said Anton Caha, did not believe said testimony so as aforesaid by him given, or any part of it, and when in truth and in fact said testimony, and all of it, was wholly false and untrue, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

12 *Second Count.*

At the term of the district court of the United States of America in and for the said district of Kansas begun and held at Wichita, in said district, on the fifth day of September, in the year of our Lord one thousand eight hundred and ninety-two, the grand jurors of the United States of America, duly impaneled, sworn and charged to inquire of offenses committed within that part of the Indian Territory lying north of the Canadian river, and east of Texas and the one-hundredth meridian, not set apart and occupied by the Cherokee, Creek and Seminole Indian tribes, upon their oaths do find and present, that at and within that part of the public domain acquired by the United States of America by the act of Congress approved March 2, 1889, commonly known as Oklahoma, and being a part of the district of Kansas, on the 3d day of January, in the year of our Lord one thousand eight hundred and ninety, at that part of the district of Kansas aforesaid, the same being a place and district of country under the exclusive jurisdiction of the United States and within the jurisdiction of this court, in the United States land office at Kingfisher, in said part of the district of Kansas aforesaid, of which said land office J. V. Admire was then and there the duly appointed, qualified and acting receiver, and J. C. Roberts was then and there the duly appointed, qualified and acting register of said land office, a certain land contest and cause was pending and then and there came on to be tried, wherein one Thomas Burch having before that time, to wit, on the 9th day of May, 1889, filed his affidavit of contest in said land office, wherein he, the said Thomas Burch, contested the homestead entry of one Anton Caha to the northwest quarter of section twelve, in township eleven north of range five west of the Indian meridian, which said land then and there laid within the jurisdiction of the Kingfisher land-office district, and within the jurisdiction of the register and receiver of said land office at Kingfisher, and sought to have the homestead entry of the said Anton Caha, which homestead entry had before that time, to wit, on the 25th day of April, 1889, been filed by the said Anton Caha at the United States land office duly created and located at Kingfisher, in that portion of the district of Kansas aforesaid, canceled and forfeited to the United States, for the reason that he, the said Anton Caha, had made said homestead entry contrary to the laws of the United States and was not entitled to said land; for the reason that he, the said Anton Caha, had violated the proclamation of the President of the United States dated the 23d day of March, 1889.

And the grand jurors aforesaid, upon their oaths aforesaid, do further find and present, that it then and there became and was a material question in said land contest and cause then and there pending in said land office for hearing before the register and receiver of said land office whether the said Anton Caha had entered upon or occupied contrary to law any portion of the lands open to settlement under the acts of Congress approved on the 1st and 2d

days of March respectively, in the year of our Lord one thousand eight hundred and eighty-nine, and the proclamation of the President of the United States dated the 23d day of March, in the
13 year last aforesaid, and between said 23d day of March 1889, and prior to 12 o'clock noon of the 22d day of April, in the year last aforesaid; and thereupon it then and there became necessary and was material, in order to entitle the said Thomas Burch to have the homestead entry of the said Anton Caha aforesaid canceled and forfeited to the United States, that the said Thomas Burch should establish to the satisfaction of the register and receiver of said land office so as aforesaid located at Kingfisher, being the land district in which said land as hereinbefore described lies, the proof of the fact that said Anton Caha had entered upon and occupied contrary to law any portion of the lands opened to settlement under the acts of Congress approved on the 1st and 2d days of March respectively in the year of our Lord one thousand eight hundred and eighty-nine, and the proclamation of the President of the United States dated on the 23d day of March, in the year last aforesaid, and between said 23d day of March, 1889, and prior to 12 o'clock noon of the 22d day of April, in the year last aforesaid; and thereupon it became and was necessary and material, in order to prevent the cancellation of the homestead entry of the said Anton Caha that he, the said Anton Caha, should establish to the satisfaction of the land office of the United States, and to the satisfaction of the register and receiver so as aforesaid located at Kingfisher, in said district of Kansas, being the land district in which the lands hereinbefore described lie, the proof of the fact that he, the said Anton Caha, had not entered upon and occupied any portion of the lands open to settlement under the acts of Congress approved on the 1st and 2d days of March respectively, in the year of our Lord one thousand eight hundred and eighty-nine, and the proclamation of the President of the United States dated the 23d day of March in the year last aforesaid, and between the 23d day of March, 1889, and prior to 12 o'clock noon of the 22d day of April, of the year last aforesaid, said proof then and there being material and necessary to defeat said contest and to prevent the homestead entry of him, the said Anton Caha, from being canceled.

And the grand jurors aforesaid, upon their oaths aforesaid, do further find and present, that Anton Caha, then and there was produced as a witness in behalf of Anton Caha in said land contest and cause, and as such witness in said land contest and cause was then and there duly sworn to testify to the truth, the whole truth, and nothing but the truth, in said land contest and cause, by the said J. C. Roberts, he, the said J. C. Roberts, register as aforesaid, being then and there duly authorized and empowered under the laws of the United States of America and the regulations of the General Land Office of the United States to administer such oath; and being then and there a witness in said land contest and cause as aforesaid, and being so duly sworn as aforesaid, the said Anton Caha did knowingly, willfully, corruptly and feloniously testify, depose, and swear, among other things, in answer to certain questions ma-

terial to the matter in issue, then and there first put and asked, in substance and to the effect following, that is to say:

Please describe the appearance, condition, and character of that river (meaning thereby the South Canadian river) as it was on the 23d day of April, as near as you can (meaning thereby the said Anton Caha).

A. The river (meaning thereby the South Canadian river) on the day of the 22 of April, 1889, was just a few days after a large and big raise, and I (meaning thereby the said Anton Caha) think it was gradually falling; the water that we (meaning thereby the said Anton Caha and his party) had crossed on Saturday afternoon was about 40 to 50 ft. wide, I judge, and direct north across the sand bar (meaning thereby the sand bar of the South Canadian river) I should think would be about 250 yds., and the water in the N. channel was about 60 yds. wide, and beyond the water there was still a sand bar of about 100 ft. direct west from our (meaning thereby the said Anton Caha and his party) camp; there was a stream running across the sand bar (meaning thereby the sand bar of the South Canadian river) from S. W. to N. E., and then a sand bar (meaning thereby a sand bar of the South Canadian river) between the N. channel (meaning thereby the north channel of the South Canadian river) and the south channel (meaning thereby the south channel of the South Canadian river) on which we (meaning thereby the said Anton Caha and his party) staid until 12 o'clock noon, April 22, 1889—

14 Whereas in truth and in fact the said Anton Caha was not on a sand bar (meaning thereby a sand bar on the south side of the main channel of said South Canadian river) between the north channel and the south channel of the South Canadian river until 12 o'clock noon of April 22d, 1889, but, as a matter of fact, he, the said Anton Caha, was at said time within the Oklahoma country; and whereas in truth and in fact he, the said Anton Caha, did not stay on the said sand bar on the south side of the main channel of said South Canadian river until 12 o'clock noon of said 22d day of April, 1889, but, as a matter of fact, he, the said Anton Caha, had entered said Oklahoma country long prior to 12 o'clock noon of the 22d day of April, 1889, and subsequent to the 2d day of March, 1889, and also subsequent to the 23d day of March, 1889; and whereas in truth and in fact the said Anton Caha did not enter said Oklahoma country after 12 o'clock noon of the 22d day of April, 1889, but in truth and in fact he, the said Anton Caha, had entered said Oklahoma country prior to 12 o'clock noon of the 22d day of April, 1889, and subsequent to the 2nd day of March, 1889, and subsequent also to the 23d day of March, 1889—

All of which the said Anton Caha then and there well knew; all of which statements so falsely made as aforesaid, in answer to the questions aforesaid, were then and there embodied in a written record of said contest, which said written record of said contest was then and there subscribed and sworn to by the said Anton Caha before the said J. C. Roberts, register of the United States land office at Kingfisher as aforesaid; and which said written record of con-

test was then and there filed with the register and receiver of the United States land office at Kingfisher as aforesaid, and which said testimony as aforesaid constituted part of the record in said contest, and was material matter in and to the said contest and cause so instituted, begun and heard as aforesaid, and was then and there not true, but false, and was then and there by the said Anton Caha not believed to be true, but was then and there by him believed to be false.

And the grand jurors aforesaid, upon their oaths aforesaid, do say, that Anton Caha aforesaid, on the 3d day of January, in the year of our Lord one thousand eight hundred and ninety, at the United States land office so located at Kingfisher, in the district of Kansas aforesaid, before the said J. C. Roberts, register of the United States land office located at Kingfisher as aforesaid, in the district of Kansas aforesaid, the said J. C. Roberts, register of the said United States land office as aforesaid, then and there having such power and authority as aforesaid, by his own act and consent, and of his own wicked and corrupt mind, in manner and form aforesaid, falsely, wickedly, willfully, knowingly, unlawfully and feloniously did commit willful and corrupt perjury, and did then and there, in manner and form and to the effect as aforesaid, testify and swear that all the matters and things hereinbefore specified and set forth were true, when in truth and in fact he, the said Anton Caha, did not believe said testimony so as aforesaid by him given, or any part of it, and when in truth and in fact said testimony, and all of it, was wholly false and untrue, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

P. L. SOPER,
Assistant United States Attorney for the District of Kansas.

15 [Endorsed:] No 963. The United States *vs.* Anton Caha. Indictment for perjury. Sec. 5392. A true bill. H. B. Kelly, foreman. Witnesses: Jos. Schanenbach, Anton Hauck, John Denkins, J. D. Troop, Jno. A. Blackburn, Jos. G. Blackburn, David Reeser, A. F. Jackson, Huger Wilkinson, F. M. Gault, F. H. Hunter, Joe Piper, Moses Quinsey, P. H. Long, Jos. H. Atkins, Porter Drayer, Jas. M. Thorp, Albert Gilmer, Chas. Gilmer, Geo. Roderick, J. P. Ellis, Jno. W. Austin, W. S. Williams, A. H. McMillen, Mrs. Waynick, Jno. I. Case, Scott Page, J. W. Carter, W. E. Banks, Wm. Blank, Wm. Breakir, W. J. Tucker, E. R. Tucker, N. C. Belcher, I. T. Ivie, Henry D. Johnson, Marcus D. Oliver, Fred. Austian, Edward E. Fuller, T. A. Couch, M. H. Couch, Ira Couch, H. H. Stafford, Thomas Burch, Clarence Earl, William Howard, Chas. H. McBride, Jeff. D. Castleman, S. T. Williams, T. G. Hancock, D. F. McKay, Jos. Farris, Daniel T. Fuller, Mary Radebaugh, Frank P. Drayce, William Thornton, O. Melrose, Richard Thompson, G. C. Gage, John Hubatka, Fred. Raimond, Geo. Farris, Jno. B. Wilson, Major Howard, Jno. Lathram, Wm. Lathram, Levi Shively, W. W. Piper. Filed September 22nd, 1892. J. C. Wilson, clerk, by J. F. Shearman, D. C.

16 UNITED STATES OF AMERICA, } ss:
District of Kansas, }

At a term of the district court of the United States of America for the district of Kansas, begun and held at the city of Wichita, in said district on Monday, the 12th day of September, 1892, proceedings were had and appear of record in words and figures following, to wit:

THURSDAY, *December 15th*, 1892.

UNITED STATES } 963. Perjury.
vs.
ANTON CAHA. }

It is thereupon now by the court here considered, ordered, and adjudged that a capias issue for said defendant, returnable at the next term of this court, defendant to give bond in the sum of three hundred dollars.

17 Thereupon, in pursuance of said order, the clerk issued a capias in the following words and figures, to wit:

THE UNITED STATES OF AMERICA, } ss:
District of Kansas, }

The United States of America to the marshal of the district of Kansas, Greeting:

You are hereby commanded that you take Anton Caha, if he shall be found in your district, and him safely keep, so that you may have his body before the district court of the United States of America for the district of Kansas, to be held in Wichita, in said district, before the judge of said court, on the 6th day of March next, to answer unto a certain indictment for perjury, which has been returned against him unto our said court by the grand inquest of the United States in and for said district; and hereof fail not, and have you then and there this writ, with the return of your doings thereon.

Witness the Hon. C. G. Foster, judge of the said court, at Topeka, in the said district, this 19th day of December, A. D. 1892.
[SEAL.]
J. C. WILSON, *Clerk.*

No. 963. District court United States, district of Kansas. United States *vs.* Anton Caha. Alias capias: Bail required, $300.00.

Which writ was afterwards returned into court by the marshal endorsed as follows: U. S. marshal's return. District of Kansas, *ss:* Received this warrant Dec. 19th, 1892, at Topeka, and executed same by arresting the within named and delivering his body to sheriff of Sedgwick county, as herein commanded. R. L. Walker, U. S. marshal, by L. D. De Bost, deputy. Filed Febr'y 23rd, 1893. J. C. Wilson, clerk. J. W. Ady, U. S. att'y, attorney for plaintiff.

18 And afterwards and on the 6th day of March, 1893, comes the said defendant, by his attorneys, and files his demurrer to the indictment heretofore filed herein; which said demurrer is in the words and figures following, to wit:

In the District Court of the United States of America in and for the District of Kansas.

THE UNITED STATES OF AMERICA, Pl'tf,
vs.
ANTON CAHA, Defendant. } Demurrer.

Comes now the defendant and demurs to the indictment filed herein and to each and every count thereof for the following reasons:

First. That said indictment does not state facts sufficient to constitute any offense under the laws of the United States.

Second. That it appears upon the face of the indictment that this court has no jurisdiction of the person of this defendant nor of this cause.

Third. That it appears upon the face of the indictment that said offense was not committed at any place within the jurisdiction of this court.

Fourth. That it appears upon the face of the indictment that the pretended offense charged therein is and was barred by the statute of limitations at the time of the finding of this indictment.

ASP, SHARTEL & COTTINGHAM,
GEORGE GARDNER, AND
STANLEY & HUME,
Att'ys for Defendant.

[Endorsed:] 963. U. S. A. *vs.* Anton Caha. Demurrer. Filed Mch 6, 1893. J. C. Wilson, clerk.

19 And afterwards and at said term of said court in the record of the proceedings thereof appears the following in words and figures, to wit:

MONDAY, *March 6th*, 1893.

UNITED STATES
vs. } 963. Perjury.
ANTON CAHA.

Now comes as well the plaintiff, by J. W. Ady, U. S. attorney, as the said defendant, by Messrs. Asp, Shartel & Cottingham, George Gardner, and Stanley & Hume, his attorneys, and the demurrer to the indictment heretofore filed herein, coming on to be heard and being argued by counsel, is by the court overruled; to which ruling of the court the defendant duly excepted and excepts.

And afterwards and at said term of said court in the record of the proceedings thereof appears the following in words and figures, to wit:

FRIDAY, *March 10th*, 1893.

UNITED STATES)
vs. } 963. Perjury.
ANTON CAHA.)

Now comes the defendant, in his own proper person, and, being arraigned on the indictment herein, pleads not guilty thereto; and to try the matters submitted to them in the above cause comes a jury, to wit, Chas. Ruff, H. H. Davis, Allen Grubb, John Whiteself, J. H. Miller, S. M. Bennett, Thos. Ewing, Ben. Aldrich, Chas. Mossbacher, H. Wallenstein, J. E. Caldwell, and A. J. Shellabarger, who being duly empaneled and sworn the trial of the cause is proceeded with; and the hour of adjournment having arrived, the jury being admonished of their duties by the court, the further consideration of this cause is postponed until tomorrow.

20 & 21 And afterwards and on the 11th day of March, 1893, comes the said defendant, by his attorneys, and filed his motion for a verdict in his favor; which said motion is in the words and figures following, to wit:

In the District Court of the United States for the District of Kansas, 2d Division.

UNITED STATES OF AMERICA, Pl'tff,)
vs.
ANTON CAHA, Defendant.)

Motion for Verdict.

Comes now the defendant and moves the court to direct a verdict in this cause in his favor for the following reasons, to wit:

1st. That the evidence is insufficient to prove any public offense.

2d. Because the alleged offense is not proved to have been committed within the jurisdiction of this court.

3rd. Because said alleged offense was not proved to have been committed within 3 years preceding the finding of the indictment.

STANLEY & HUME,
JOHN W. SHARTEL AND
GEORGE GARDNER,
Att'ys for Def'ts.

[Endorsed:] 963. U. S. *vs.* Anton Caha. Motion of def't for verdict. Filed Mch 11, 1893. J. C. Wilson, clerk.

22 "We, the jury in the above-entitled cause, duly empaneled and sworn, upon our oaths find the defendant, Anton Caha, guilty as charged in the indictment.

HENRY WALLENSTEIN, *Foreman.*"

23 UNITED STATES OF AMERICA, } ss:
District of Kansas, }

Know all men by these presents that Anton Caha, as principal, and George Gardner and W. E. Stanley, as sureties, are held and firmly bound unto the United States of America in the sum of one thousand dollars; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators.

The condition of the above bond is that whereas one Anton Caha was, at the March term, A. D. 1893, of the United States district court for the district of Kansas, convicted of the crime of perjury:

Now, therefore, if the said Anton Caha shall be and appear in his own proper person before the district court of the United States for the district of Kansas, at the present term thereof, to be holden in the city of Wichita, in said district, on Tuesday, the 21st day of March, A. D. 1893, and not depart therefrom without leave of the said court first had and obtained, then this bond shall be null and void; otherwise to remain in full force and effect.

In witness whereof we have hereunto set our hands and seals this 13th day of March, A. D. 1893.

ANTON CAHA. [SEAL.]
GEORGE GARDNER. [SEAL.]
W. E. STANLEY. [SEAL.]

Signed in the presence of and acknowledged before me this the 13 day of Mch, A. D. 1893.

J. C. WILSON,
Clerk of said Court.
By J. F. SHEARMAN, *D. C.*

Approved Mch 13, 1893.

WALKER,
U. S. Marshal.
By DE BOST, *Deputy.*

[Endorsed:] Case No. 963. The United States *vs.* Anton Caha. Bond, $1,000.00, for appearance at March term of district court, A. D. 1893. Filed this 13th day of Mch, 1893. J. C. Wilson, clerk, by J. F. Shearman, D. C.

24 And afterwards and on the 14th day of March, 1893, comes the said defendant, by his attorneys, and files his motion for a new trial herein; which said motion is in words and figures following, to wit:

In the District Court of the United States for the District of Kansas, Second Division.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
ANTON CAHA, Defendant.

Motion to Set Aside Verdict and Grant New Trial.

Now comes the said defendant, Anton Caha, and moves the court to set aside the verdict rendered in the above-entitled cause on the 11th day of March, 1893, at the present term of this court, and grant this defendant a new trial herein for the following reasons, affecting materially the substantial rights of this defendant:

First. That the jury was permitted to receive and did receive evidence, papers, and documents not authorized by law.

Second. Admission by the court of illegal testimony.

Third. That the court misdirected the jury in material matters of law.

Fourth. Misconduct of the jury.

Fifth. That the verdict is contrary to law.

Sixth. That the said verdict is contrary to the evidence.

Seventh. Error of law occurring at the trial and excepted to by this defendant.

ASP, SHARTEL & COTTINGHAM,
STANLEY & HUME, AND
GEORGE GARDNER,
Attorneys for Defendant.

[Endorsed:] 963. U. S. *vs.* Anton Caha. Motion for new trial. Filed Mch 14, 1893. J. C. Wilson, clerk.

25 And afterwards and on the 31st day of March, 1893, comes the said defendant, by his attorneys, and files his motion in arrest of judgment in said cause; which motion is in words and figures following, to wit:

In the District Court for the District of Kansas, Second Division, Sitting at Wichita, in said District.

UNITED STATES OF AMERICA, Plaintiff,
vs.
ANTON CAHA, Defendant.

Comes now the defendant and moves the court in arrest of judgment herein, and shows to the court that the judgment of the court should not be pronounced against said defendant on the verdict rendered in this cause for the following reasons, to wit:

Because the indictment in said cause does not in any count thereof state any public offense against the laws of the United States and

the defendant ought not to have been tried and convicted on the charge contained in said indictment.

W. E. STANLEY &
J. W. SHARTEL,
Attorneys for Defendant.

26 [Endorsed:] 963. U. S. *vs.* Anton Caha. Motion in arrest of judgment. Filed March 31, 1893. J. C. Wilson, cl'k.

And afterwards and at said term of said court in the record of the proceedings thereof appears the following in words and figures, to wit:

FRIDAY, *March* 31*st*, 1893.

UNITED STATES
vs. } 963. Perjury.
ANTON CAHA.

Now come the parties, same as before, and on motion of J. W. Ady, U. S. att'y, the court on the verdict of guilty heretofore rendered herein passes sentence as follows:

It is thereupon now by the court here considered, ordered, and adjudged that the defendant be imprisoned in the Kansas State penitentiary for two years at hard labor, and that he pay a fine of ten dollars.

It is further ordered that the said defendant, Anton Caha, remain in the custody of the marshal until June 15th, 1893, and that he then be delivered to the warden of the penitentiary and his term to begin at that time.

It is further ordered that if, while in the custody of the marshal, defendant give bond in the sum of three thousand dollars ($3,000), to be approved by the clerk of this court or by his deputy, conditioned that he appear at Wichita, Kansas, June 15th, 1893, and then and there surrender to the U. S. marshal, he may be released until that date.

27 And afterwards and at said term of said court in the record of the proceedings thereof appears the following in words and figures, to wit:

SATURDAY, *April* 1*st*, 1893.

THE UNITED STATES OF AMERICA, Plaintiff,
vs. } 953. Perjury.
ANTON CAHA, Defendant.

Now, on this first day of April, A. D. 1893, this cause comes on to be heard on motion of the defendant, Anton Caha, for a new trial herein, and the defendant, Anton Caha, being present in person and by John W. Shartel and George Gardner, his attorneys, and the plaintiff being present by Honorable Joseph W. Ady, the United States district attorney for the district of Kansas, said motion is argued to the court, and the court, after hearing argument of counsel and being fully advised in the premises, overruled said motion, to which ruling the defendant excepted and excepts.

And thereupon said cause came on to be heard upon the motion of the defendant in arrest of judgment in this cause, and, parties being present as hereinbefore set out, the said motion in arrest of judgment is duly argued to the court, and the court, after hearing the argument of counsel and being duly advised in the premises, overrules said motion, to which ruling the defendant, by his counsel, duly excepted and excepts.

And thereupon at this time it is by the court ordered, on the application of the defendant, that the defendant be given thirty days from this date in which to reduce his bill of exceptions to writing and present the same, presenting the exceptions of said defendant taken on the trial of said cause, and also upon any and all other matters wherein any of the rulings of the court defendant may wish to assign as error made at, before, or since the trial of said cause.

28 And it is further ordered by the court that the term of this court be extended beyond and adjourned beyond the date allowed for the preparing and presenting to the judge of this court his bill of exceptions, to wit, until the first day of May, A. D. 1893.

29 Rob't Kincaid, president; Eugene Wallace, vice-pres't; J. H. Wheeler, cashier.

Bank of Oklahoma City.

Capital stock, $50,000.00.

OKLAHOMA CITY, O. T., *May 1st*, 1893.

To whom it may concern:

To the best of my knowledge and belief the attached bond signed by O. A. Mitscher and others is good for three thousand dollars ($3,000.00).

J. H. WHEELER, *Cashier*.

TERRITORY OF OKLAHOMA, } ss:
Kingfisher County, }

I, W. S. Lamb, deputy clerk of the district court, second judicial district, Territory of Oklahoma, of which judicial district said Kingfisher county forms a part, do hereby certify that property described in the affidavit of John Skorepa attached to the bond of Anton Caha, to wit, lot 19, block 7, in the city of Kingfisher, in said county of Kingfisher, is, in my judgment, worth $3,000.00, and that said Skorepa is a qualified bondsman in my opinion in that amount.

In testimony whereof I have hereunto set my hand and the seal of said court, at my office, in Kingfisher, O. T., this 29th day of April, 1893.

[SEAL.]

W. S. LAMB,
Dep. Dist. Clerk.

FIRST NATIONAL BANK,
OKLAHOMA CITY, O. T., —— —, 189–.

To the best of my knowledge and belief the attached bond signed by O. A. Mitscher and Frank Mach is good for three thousand dollars.

J. P. BOYLE, *Cr.*

5, 1, '93.

30 UNITED STATES OF AMERICA, }
District of Kansas, } ss:

I, the undersigned, surety on the within undertaking, do solemnly swear that I am a resident of the *State* of Oklahoma, and that I am worth seven hundred dollars over and above all exemptions, debts, and liabilities, consisting of house and lot in Oklahoma City, O. T., $1,000.00, saloon and fixtures $600.00, seven hundred dollars of real-estate mortgage (note), so help me God.

FRANK BENSCH.

Subscribed and sworn to before me this 1st day of May, A. D. 1893.

[SEAL.]

J. C. DEAN,
Notary Public.

UNITED STATES OF AMERICA, }
District of Kansas, } ss:

I, the undersigned, surety on the within undertaking, do solemnly swear that I am a resident of the *State* of Oklahoma, and that I am worth two thousand dollars over and above all exemptions, debts, and liabilities, consisting of lots 1, 2, 3, 4, & 5, in B. 34; 7, 8, 9, 10, & 11, in B. 35; 17 & 18, B. 38; 10 & 11, B. 32, in Oklahoma City, O. T., of the value of three thousand dollars, so help me God.

O. A. MITSCHER.

Subscribed and sworn to before me this 1st day of May, A. D. 1893.

[SEAL.]

J. A. DEAN,
Notary Public.

UNITED STATES OF AMERICA, }
District of Kansas, } ss:

I, the undersigned, surety on the within undertaking, do solemnly swear that I am a resident of the —, and that I am worth three thousand dollars over and above all exemptions, debts, and liabilities, consisting of lot 19, in block 7, in the city of Kingfisher City, formerly known as Lisbon, Oklahoma, so help me God.

JOHN SKOREPA.

31 Subscribed and sworn to before me this 18 day of April, A. D. 1893.

N. CAMPBELL,
Notary Public.

[SEAL.]

My notary public commission, which is on file in departments at Washington, D. C., expires Dec. 27, 1894.

UNITED STATES OF AMERICA, }
District of Kansas, } *ss:*

I, the undersigned, surety on the within undertaking, do solemnly swear that I am a resident of the —, and that I am worth three thousand dollars over and above all exemptions, debts, and liabilities, consisting of one grain elevator in the city of Oklahoma, known as Santa Fé elevator, Oklahoma City, Oklahoma, so help me God.

FRANK MACH.

Subscribed and sworn to before me this 19th day of April, A. D. 1893.

A. J. HUBYCKA,
[SEAL.] *Notary Public.*

My commission expires April 30th, 1896.

UNITED STATES OF AMERICA, }
District of Kansas, } *ss:*

Know all men by these presents that Anton Caha, as principal, and —— ——, as sureties, are held and firmly bound unto the United States of America in the sum of three thousand dollars; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators.

The condition of the above bond is such that—

Whereas the above-mentioned Anton Caha was at the September term, A. D. 1892, of the district court of the United States in and for the district of Kansas indicted for the crime of perjury, and upon the trial thereof, at the March term, A. D. 1893, of said court, was found guilty, and was by the judge of said court, on the 31st
32 day of March, A. D. 1893, sentenced to be imprisoned in the Kansas penitentiary, at Lansing, at hard labor for the period of two years and to make unto the United States his fine in the sum of ten dollars, and was disqualified from testifying in any court of the United States so long as said judgment remained unreversed; and

Whereas by the further judgment of said court, for good cause shown, it was ordered that the said term of imprisonment of the said Anton Caha should begin on the 15th day of June, 1893, and that until said 15th day of June, 1893, he, the said Anton Caha, should remain in the custody of the marshal of the district of Kansas unless the said Anton Caha should give good and sufficient bond in the said sum of three thousand dollars, conditioned that he would on the said 15th day of June, 1893, at the Government building in the city of Wichita, in the said district of Kansas, surrender himself to said United States marshal for the enforcement of such judgment and sentence of the court:

Now, therefore, if the said Anton Caha shall be and appear in his

own proper person at the Government building in the city of Wichita, in the said district of Kansas, at 9 o'clock a. m. on the said 15th day of June, A. D. 1893, and shall then and there surrender himself into the custody of the United States marshal for the district of Kansas for the enforcement of the said sentence and judgment of the court, then and in that event this bond shall be null and void; otherwise it shall remain in full force and effect.

In testimony whereof we have hereunto set our hands and seals this 3d day of April, A. D. 1893.

J. C. ROBBERTS. [SEAL.]
JOHN SKOREPA. [SEAL.]

33 Signed in the presence of and acknowledged before me this 18th day of April, A. D. 1893.

N. CAMPBELL,
[SEAL.] *Notary Public.*

My notary public commission, which is on file in the departments at Washington, D. C., expires Dec. 27, 1894.

FRANK MACH. [SEAL.]
FRANK BENSCH. [SEAL.]
FRANK REZNY. [SEAL.]
JOHN HROBI. [SEAL.]
O. A. MITSCHER. [SEAL.]

Signed in the presence of and acknowledged before me this 19th day of April, A. D. 1893.

A. J. HUBYCKA,
[SEAL.] *Notary Public.*

My commission expires April 30th, 1896.

TERRITORY OF OKLAHOMA, }
Oklahoma County. }

Personally appeared before me O. A. Mitscher & Frank Bensch and acknowledged the execution of the above bond this May 1st, '93.

J. C. DEAN,
[SEAL.] *Notary Public.*

Endorsed: No. 963. U. S. *vs.* Anton Caha. Filed May 2nd, 1893. J. C. Wilson, cl'k, by J. F. Shearman, D. C. Approved May 2, 1893. J. C. Wilson, cl'k, by J. F. Shearman, D. C.

34 And afterwards and on the 5th day of May, 1893, comes the said defendant, by his attorneys, Messrs. Asp, Shartel & Cottingham, Stanley & Hume, & Geo. Gardner, and files his bill of exceptions in said cause; which said bill of exceptions is in the words and figures following, to wit:

In the United States District Court for the District of Kansas, Second Division, Sitting at Wichita, in said State.

UNITED STATES OF AMERICA, Plaintiff, *vs.* ANTON CAHA, Defendant. } Bill of Exceptions. No. 963.

Be it remembered that on the 10th & 11th days of March, A. D. 1893, at the regular March term of said court, holden at Wichita, in said division, commencing on the 6th day of March, A. D. 1893, in a certain cause therein pending, wherein The United States of America is plaintiff and the said Anton Caha is defendant, the defendant was tried in said court before a jury duly empanelled and sworn to try said cause on a plea of not guilty to the indictment found in said cause, which said indictment and plea fully appear by the record in said cause.

On the trial of said cause and after the jury was empanelled and sworn and after the opening statement of counsel to the jury the plaintiff in said cause introduced its testimony as follows, to wit:

First. It was proved by the plaintiff that J. C. Roberts was the duly appointed, qualified, and acting register of the land office of the United States located at Kingfisher, in that portion
35 of country known as Oklahoma, as alleged in the indictment.

Second. It was proved that J. V. Admire was the duly appointed, qualified, and acting receiver of said land office as alleged in the indictment.

Third. It was also proved that Anton Caha filed a certain homestead entry in said land office at Kingfisher as aforesaid in the manner and form alleged in the indictment; which said homestead entry is in words and figures following, to wit:

"(4–137.)

Receiver's receipt No. 105. Application No. 105.

RECEIVER'S OFFICE, U. S. LAND OFFICE,
KINGFISHER, OKLAHOMA, *April* 25, 1889.

Received of Anton Caha the sum of $14.00 — cents, being the amount of fee and compensation of register and receiver for the entry of the N. W. ¼ of sec. 12, in township 11 N., of range 5 W., under section No. 2290, Revised Statutes of the United States.

$14. J. V. ADMIRE, *Receiver.*

(4–102.)

Affidavit.

LAND OFFICE AT KINGFISHER STAGE STATION,
INDIAN TERRITORY, *April* 25, 1889.

I, Anton Caha, of Oklahoma Station, I. T., applying to enter a homestead, do solemnly swear that I did not enter upon and occupy

any portion of the lands described and declared open to entry under the President's proclamation dated March 23, 1889, prior to 12 o'clock noon of April 22nd, 1889.

ANTON CAHA.

Sworn to and subscribed before me this 25th day of April, 1889.
J. C. ROBERTS, *Reg.*

36 (4–063.)

Affidavit.

Homestead.

LAND OFFICE AT KINGFISHER STAGE STATION,
INDIAN TERRITORY, *April* 23, 1889.

I, Anton Caha, of Oklahoma Station, I. T., having filed my application No. 105 for an entry under section No. 2289, Revised Statutes of the United States, do solemnly swear that I am the head of a family, over 21 years of age, and am a naturalized citizen of the United — ; that said application No. 105 is made for the purpose of an actual settlement and cultivation; said entry is made for my own exclusive benefit and not directly or indirectly for the benefit or use of any other person or persons whomsoever, and that I have not heretofore had the benefit of the homestead laws.

ANTON CAHA.

Sworn to and subscribed this 25 day of April, 1889.
T. C. ROBERTS,
Reg. of the Land Office.

(4–007.)

Application No. 105. Homestead.

LAND OFFICE AT KINGFISHER STAGE STATION,
INDIAN TERRITORY, *April* 25, 1889.

I, Anton Caha, of Oklahoma Station, I. T., do hereby apply to enter under section 2289, Revised Statutes of the United States, what is known as the northwest quarter of section 12, township 11 north, of range five west, Indian meridian, containing 160 acres.

ANTON CAHA.

LAND OFFICE AT KINGFISHER STAGE STATION,
INDIAN TERRITORY, *April* 25, 1889.

I, J. C. Roberts, register of the land office, do hereby certify that the above application is for certified lands and of the class which the applicant is legally entitled to under section 2289 of the Revised Statutes of the United States, and that there — no prior valid adverse right to the same.

J. C. ROBERTS, *Register.*"

That one Thomas Burch filed in said office, on the 9th day of May, 1889, a certain affidavit in words and figures following, to wit:

"*Affidavit to be Filed Before Contest of Homestead Entry.*

37 UNITED STATES LAND OFFICE,
KINGFISHER, I. T., *May* —, 1889.

Personally appeared before me —— ——, — of *that* land office, Kingfisher, I. T., Thomas Burch, of Oklahoma, Indian Territory, who upon his oath says—

That he is well acquainted with the tract of land embraced in the homestead entry No. 105, made April 24, 1889, northwest quarter of section 12, in township 11 north, of range 5 west. Anton Caha entered the territory known as Oklahoma, I. T., prior to 12 o'clock noon of the 22nd day of April, A. D. 1889, in violation of the act of Congress of March 2nd, 1889, and the President's proclamation of March 23, 1889, opening said lands to settlement, and, in consequence of his violation of said act of Congress and the proclamation of the President made in pursuance thereof, forfeited his rights to enter any of the lands declared open to settlement in Oklahoma, Indian Territory; that on the date of said homestead entry aforesaid said affiant was the only prior *bona fide* settler residing upon and improving said tract of land; that affiant is the only *bona fide* prior legal settler upon said tract; that on the 22nd day of April, 1889, at — minutes past 12 o'clock of said day, said affiant made a personal settlement upon said tract; that affiant is a legal qualified homestead entryman, as more fully appears from his homestead application and affidavits thereto attached, and this the said contestant is ready to prove at such time as may be named by the register and receiver for a hearing in said case, and he therefore asks to be allowed to prove said allegations; that said homestead entry No. 105 may be declared cancelled and forfeited to the United States, he, the said contestant, paying the expenses of such hearing on his own behalf, and that by virtue of his prior legal settlement and the disqualifications of said homestead entrymen he be allowed to enter said tract of land under his homestead application hereto attached.

THOMAS BURCH.

Sworn and subscribed this day and year above written before.
J. C. ROBERTS, *Register.*

Also appeared at the same time and place Christian Johnson, and who, being duly sworn, depose and says that *they are* acquainted with the tract described in the within affidavit of Thomas Burch and know from personal observation that the statements therein made are true.

CHRISTIAN JOHNSON.

Sworn to and subscribed this 9th day of May, 1889.
J. C. ROBERTS, *Register.*

(Endorsed:) Affidavit of contest of Thomas Burch *vs.* H'd No. 105 by Anton Caha. $6.00 p'd. U. S. land office, 1 p. m., May 9, 1889, Kingfisher, Oklahoma."

38 Fifth. That notice of the filing of such affidavit was issued by J. V. Admire, receiver of said land office, to the said Anton Caha on the 22nd day of October, 1889, and service thereof accepted by said Anton Caha on said date and day; which notice and acceptance thereof is in words and figures following, to wit:

"(4–345.)

U. S. LAND OFFICE,
KINGFISHER, INDIAN TER., *October* 22, 1889.

Complaint having been entered at this office by Thomas Burch, of Oklahoma City, I. T., against Anton Caha for violating the act of March 2, 1889, and the President's proclamation of March 23, 1889, and alleging that said Thomas Burch was the first actual settler thereon, on homestead entry No. 105, dated April 24, 1889, upon the northwest quarter of section 12, township 11 north, of range 5 west, in Oklahoma, Indian Territory, with a view of the cancellation of said entry, and said parties are hereby summoned to appear at the Kingfisher U. S. land office, at Kingfisher, I. T., on the 2nd day of December, 1889, at 9 o'clock a. m., to respond to and furnish testimony concerning all the allegations in said affidavit of contest filed by said Thomas Burch *v.* said Anton Caha.

J. V. ADMIRE, *Receiver.*

NOTE.—The fact and date of service upon the homestead settler should be endorsed on this notice.

* * * * * * *

I, Anton Caha, hereby waive all service of summons in this case named in the within notice and enter my appearance in said case and waive all defects, if there are any, in the issuance of said notice, dated this 22nd day of October, 1889.

ANTON CAHA,
By J. W. McLOUD,
His Attorney."

Sixth. An abstract of a certain record in the said land office at said Kingfisher, as aforesaid, showing the docket entries made and entered in said contest, it appearing by said record that pursuant to said affidavit of contest that the register and receiver of said land office, from the 22nd day of October, 1889, to and including the 11th day of January, 1890, proceeded to hear and determine said contest, and administer oaths to witnesses in said contest, and to try and determine the issue raised by said contest affidavit upon the oral testimony of witnesses called before them
39 and by them sworn to testify the truth, the whole truth, and nothing but the truth in said matter so claimed to have been pending before them; and that afterwards, on the 21st day of June, 1890, that said register and receiver, upon the testimony so introduced and offered by the said Thomas Burch and said Anton Caha, found the issues joined under said contest affidavit in favor of the said Anton Caha.

Seventh. Certain portions of written testimony in said record of

said contest reduced to writing from the oral testimony of said Anton Caha on said hearing: which said portion of said written testimony is in words and figures as stated in the indictment.

Eighth. That said plaintiff then introduced divers — sundry witnesses to testify to certain facts falsifying the testimony so proved to have been given by the defendant, Anton Caha, on said contest before said register and receiver of said Kingfisher land office as aforesaid; the above and foregoing being all of the testimony introduced on the trial of said cause; and upon such proofs, and without offering or tendering any proofs and without the introduction of any proofs as to any directions, rules, or regulations of the Secretary of the Interior or the Commissioner of the General Land Office authorizing the holding of the contest in the case of the homestead entry by the register and receiver of the local land office, or by the register and receiver of the said land office at said Kingfisher, as aforesaid, or either or both of them, did thereupon rest his case.

And thereupon the defendant filed in said court a motion asking said court to direct a verdict in favor of the defendant, because the proofs offered were and are insufficient in law to prove any public offense against said defendant.

40 *First Exception.*

The defendant upon the offer of the aforesaid affidavit of contest, and before the same was admitted as evidence, objected to the same for the following reasons: First, that said affidavit does not conform to the indictment and does not support the issues joined on the part of the Government, and does not prove and did not prove the issue in the indictment, to wit, that the issue brought in said local land office, as to whether said Anton Caha entered upon and occupied any of said lands prior to 12 o'clock noon of April 22nd, 1889, whereas said instrument so offered shows that the issues being tried and which *was* tried in said land-contest case *was*, first, whether or not the said Thomas Burch made prior settlement on the tract of land in controversy prior to the settlement of said Anton Caha; and, second, whether the said Anton Caha had entered the Oklahoma country prior to 12 o'clock noon of April 22nd, 1889, and not whether Anton Caha had entered upon and occupied any of said land in said Oklahoma country prior to 12 o'clock noon of April 22nd, 1889, and that said proofs so made was and is at variance to and with the indictment; which objection was by the court overruled in the presence of the jury, and the defendant then and there, at the time of said ruling overruling said objection, in the presence of the court and the jury trying said case, excepted to such ruling.

Second Exception.

The defendant at the close of the testimony made a motion requesting the court to direct a verdict in said case in favor of said defendant and acquitting said defendant of said charge for the reason that the evidence was insufficient in law to prove the charge

contained in the indictment: which motion was in writing and specified the reason therefor the omission of the plaintiff
41 to prove any authority for the said register and receiver constituting themselves tribunals to hear and determine said contest and examine witnesses under oath touching the truth or falsity of said contest affidavit; upon said proposition no proofs whatever were offered, no evidence given, no rules or regulations of the Commissioner of the General Land Office or the Secretary of the Interior or either or both of them authorizing or directing the register or receiver or either of them of said land office, or of any other land office to hear, try, and determine such issues or administer oaths to witnesses upon such matters arising in such local land office, nor arising before the register and receiver of the land office at said Kingfisher, as aforesaid, either in such controversies generally or in the controversy between the said Thomas Burch and the said Anton Caha as aforesaid.

The court upon such objection ruled that as a matter of law the said register and receiver were authorized to constitute themselves a tribunal for hearing such controversies and were by law authorized to administer oaths to witnesses upon the hearing thereof, and were at the *the* time of such hearing of the said contest between the said Thomas Burch and the said Anton Caha duly authorized and empowered by the laws of the United States to hear and determine the same and administer oaths to witnesses upon such hearing and determination touching the truth or falsity of said contest affidavit, and overruled said motion of the defendant for the direction of a verdict by reason of such conclusion. The defendant thereupon, in the presence of the jury, duly excepted to such ruling of the court overruling such motion for a verdict, and the defendant in said cause declined to introduce any testimony in said cause and rested his case without the introduction of any testimony.

42 Thereupon the court proceeded to instruct the jury, and, notwithstanding the fact that no testimony had been introduced in said case tending to prove any such authority of the register and receiver or either of them of said land office to hear and determine said contest and to administer oaths to witnesses on said hearing, or any evidence tending to prove any authority of the register and receiver of any local land office generally by any rules, regulations, or directions of the Commissioner of the General Land Office or of the Secretary of the Interior authorizing said register and receiver to hear and determine said particular contest or contest of homestead entry generally in said local land office by the register and receiver thereof or either or both of them, as hereinbefore set out, directed said jury as follows:

"GENTLEMEN OF THE JURY: The court instructs you that as a matter of law the register and receiver of the land office at Kingfisher, either or both of them, were duly authorized to administer oaths to witnesses upon the hearing of such contest and were duly authorized and empowered by the laws of the United States to administer the oath alleged to have been administered to the said defendant, Anton Caha, upon said hearing of said homestead contest."

And to which instruction above set out the defendant at the time, and before the jury retired and in the presence and hearing of the jury, duly excepted.

Third Exception.

On the 31st day of March, 1893, in said cause, said defendant filed a motion in arrest of judgment, specifying as his ground therefor in said motion that the indictment in the said cause fails to charge any public offense; which said motion was, on said date and day and prior to the entry of judgment in said cause upon the verdict, overruled by said court; to which ruling the defendant
43 excepted and excepts.

And be it further remembered that at the time of the overruling of said motion in arrest of judgment and of the entry of the judgment the defendant was given until the first day of May, 1893, in which to prepare and reduce his exceptions had and taken upon the trial and not of record in said cause to writing and present the same to the judge of this court for allowance and signing.

Wherefore the defendant prays the honorable judge of said court who tried said cause to allow, settle, and sign this his bill of exceptions in said cause.

ASP, SHARTEL & COTTINGHAM,
STANLEY & HUME & GEO. GARDNER,
Attorneys for Defendant.

UNITED STATES OF AMERICA, } *ss:*
District of Kansas, }

I, the undersigned, John A. Williams, judge of the district court of the district of Kansas and second division, setting at Wichita, in said district, duly appointed and commissioned to preside at the regular March term, A. D. 1893, of said court, do hereby certify that the above and foregoing bill of exceptions was presented to me on this 28th day of April, A. D. 1893, and during the said March term of said court, in pursuance of the orders of said court, duly made and entered, allowing until the first day of May, A. D. 1893, to said defendant to prepare and present to me his said bill of exceptions.

And I do further find the said bill of exceptions to be true, and do hereby sign, settle, and allow the same as such.

44 And it is by me further ordered that the said bill of exceptions be filed in said court as a part of the record in said cause.

JNO. A. WILLIAMS,
U. S. Dist. Judge.

Attest:
[SEAL.] J. C. WILSON, *Clerk.*

Endorsed: 963. United States *vs.* Anton Caha. Bill of exceptions. Filed May 5th, 1893. J. C. Wilson, clerk.

45 And afterwards and at said term of said court, in the record of the proceedings thereof, appears the following in words and figures, to wit:

MONDAY, *June 5th*, 1893.

United States District Court, District of Kansas.

UNITED STATES
vs. } 963. Perjury.
ANTON CAHA.

Upon presentation to me of the certificate of W. R. Thompson physician, of Oklahoma City, setting forth the condition of the wife of Anton Caha, it is ordered that the said Anton Caha be permitted to remain upon bond as at present until the 15th day of August, 1893, at which time he will report to the marshal for the district of Kansas, who will immediately deliver him to the keeper of the penitentiary, as heretofore ordered in this cause.

JNO. A. WILLIAMS,
U. S. Dist. Judge.

46 In the District Court of the United States for the District of Kansas.

UNITED STATES OF AMERICA, Plaintiff,
vs.
ANTON CAHA, Defendant.

Now, on this 30th day of June, A. D. 1893, application is made to me, the undersigned, judge of said court, duly commissioned to hold the March term thereof, 1893, to grant to the defendant a supersedeas on the writ of error by him sued out to the Supreme Court of the United States from the judgment and conviction in said cause.

And it is by me ordered that upon the giving of a bond, conditioned as required by law, for the prompt appearance of the said Anton Caha in compliance with any and all orders of the Supreme Court of the United States and of the court in which the said cause was tried, and the submission of the said Anton Caha of his person to the punishment pronounced against him by the said judgment of conviction in case the said judgment shall be affirmed, and his prompt appearance to respond to any and all further proceedings in said case, provided said judgment be reversed and all other conditions required by law—the said bond shall be in the penal sum of five thousand dollars, to be approved by the clerk of said court—that the said writ of error, upon the approval of said bond, shall operate as a supersedeas of the said judgment of conviction.

Dated this 30th day of June, A. D. 1893.

JNO. A. WILLIAMS, *Judge.*

Attest: J. C. WILSON, *Clerk.*

Endorsed: 963. U. S. *vs.* A. Caha. Order. Filed June 30th, 1893. J. C. Wilson, clerk.

47 UNITED STATES OF AMERICA, }
District of Kansas, Second Division, } *ss:*

I, J. C. Wilson, clerk of the United States district court for the district of Kansas and for the second division of said district, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record in a cause therein entitled "The United States of America, plaintiff, *vs.* Anton Caha, defendant," as the same appears of record and on file in my office.

In testimony whereof I have hereunto subscribed my name and caused the seal of said court to be hereunto affixed this 7th day of Aug., A. D. 1893, and of the Independence of the United States one hundred eighteen.

[Seal of District Court U. S., District of Kansas, 1861.]

J. C. WILSON,
Clerk of the United States District Court
for the District of Kansas.

Endorsed on cover: Case No. 15,385. Kansas D. C. U. S. Term No., 1001. Anton Caha, plaintiff in error, *vs.* The United States. Filed September 1st, 1893.

Office Supreme Court
FILED.
DEC 30 1893
JAMES H. McKENNEY
CLERK

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1001.

Anton Caha, - Plaintiff in Error,

vs.

The United States, Defendant in Error.

In Error to the District Court of the United States for the District of Kansas.

(15,385.)

BRIEF

ON BEHALF OF ANTON CAHA,

Plaintiff in Error.

FRED BEALL ,

Of Counsel for Plaintiff in Error.

WASHINGTON, D. C.:
J. S. TOMLINSON, PRINTER,
1893.

Supreme Court of the United States.

— OCTOBER TERM, 1893. —

No. 1001.

—o—

ANTON CAHA, *Plaintiff in Error,*
vs.
THE UNITED STATES, *Defendant in Error.*

—o—

In Error to the District Court of the United States for the District of Kansas.

—o—

BRIEF ON BEHALF OF ANTON CAHA,
Plaintiff in Error.

—o—

STATEMENT.

The plaintiff in error was prosecuted before the Court below, upon a charge of perjury, alleged to have been committed by him when testifying as a witness in his own behalf in the trial of a land contest proceeding before the local land office at Kingfisher, then in the Indian Territory, now in Oklahoma Territory.

The trial began in the local land office October 22, 1889, and continued to and included January 11, 1890.

T. R. 27.

April 25, 1889, the plaintiff in error made entry of N. W. ¼ Section 12, T. 11 N. R., 3 W. Indian Meridian, Indian Territory.

T. R. 25.

May 9, 1889, Thomas Burch filed in the local office an affidavit, contesting the entry of plaintiff in error, alleging two grounds of contest, viz:

First. That "Anton Caha *entered* the Territory known as *Oklahoma, I. T.*, prior to 12 o'clock, noon, of the 22d day of April, A. D. 1889, in violation of the Act of Congress of *March 2, 1889*, and the *President's Proclamation* of March 23, 1889, opening such lands to settlement, and in consequence of his violation of said Act of Congress and the Proclamation of the President made in pursuance thereof, forfeited his right to enter any of the lands declared open to settlement in Oklahoma, Indian Territory."

Second. He alleged that he was the prior legal settler on the land, and, therefore, entitled to the same against the entry of plaintiff in error.

T. R. 26.

There are two counts in the indictment, each assigning perjury on an answer to one question propounded to the plaintiff in error on the trial of said land contest. The first count alleges that he was sworn by the Register of the local office, and the other that he was sworn by the Receiver, and as the only difference in the two counts is, as to who administered the oath upon which the perjury is assigned, we will confine ourselves in the discussion of the indictment to the first count.

The plaintiff in error interposed a general demurrer to the indictment, which was overruled.

T. R. 15.

On the trial no testimony except that offered by the Government was introduced, and after the prosecution had rested its case, the defendant moved the Court for a verdict of acquittal, which was overruled, and the defendant excepted.

T. R. 16 and 28.

The jury having found the defendant guilty, he entered a motion in arrest of judgment, which was overruled; also a mo-

tion for a new trial, which was overruled. To the overruling of each of these two motions the defendant excepted.

T. R. 18.

The defendant was sentenced to the penitentiary for a period of two years.

Afterwards, at the same term of the Court, a general bill of exceptions was approved and signed by the trial Judge, and the case comes to this Court upon a writ of error, and upon the following assignment of errors:

"First. That the Court trying said cause erred in overruling the demurrer of the defendant to the indictment found and filed against him in said cause, for each and all of the reasons specified in said demurrer to said indictment, to wit:

1. That said indictment does not state facts sufficient to constitute any offense under the laws of the United States.

2. It appears on the face of the indictment that the said Court has no jurisdiction of the person of the said defendant, nor of the subject-matter of said prosecution.

3. That it appears on the face of the said indictment that said offense was not committed at any place within the jurisdiction of this Court; and,

4. That it appears upon the face of such indictment that the offense attempted to be charged therein is and was barred by the statute of limitations at the time of the finding of said indictment.

Second. The defendant further assigns as error the action of the Court in overruling the defendant's motion for a verdict, filed in said cause during the trial thereof, for the reasons stated in said motion for said verdict, as fully set out in the bill of exceptions in said cause.

Third. The Court erred in the admission of certain testimony offered on the trial of said cause on behalf of the plaintiff, to wit:

Affidavit to be filed before contest of Homestead Entry.

See Affidavit, T. R., p. 3.

Fourth. The Court erred in admitting in evidence a certain notice of contest in words and figures followlng, to wit:

See Notice, T. R., pp. 4-5.

Fifth. The Court erred in not requiring proofs of the authority of the Register and Receiver of the land office to hold, to hear, try and determine the proceedings to contest the homestead entry of this defendant and to administer oaths to witnesses on said hearing.

Sixth. The Court erred in giving to the jury in said cause a certain instruction, which said instruction is in words and figures following, to wit:

"GENTLEMEN OF THE JURY: The Court instructs you that, as a matter of law, the Register and Receiver of the land office at Kingfisher, either or both of them, were duly authorized to administer oaths to witnesses upon the hearing of such contest, and were duly authorized and empowerod by the laws of the United States to administer the oath alleged to have been administered to the said defendant, Anton Caha, upon said hearing of said homestead contest."

Seventh. The Court erred in overruling the defendant's motion in arrest of judgment filed in said cause.

Eighth. The Court erred in pronouncing judgment on this defendant on the verdict found by the jury in said cause.

Ninth. Upon the record of said cause it does not show that the defendant was properly proceeded against, and that the defendant did not have a fair and impartial trial to the jury of his peers, or was present during the trial or any portion of the same.

Tenth. The evidence as set out is insufficient to warrant in law a conviction of said defendant.

BRIEF.

The first question that presents itself for consideration is the indictment upon which the plaintiff in error was tried sufficient in law?

We think not, and in support of our opinion will proceed to point out some of the defects and insufficiences in the indictment, and the record thereof.

THE CAPTION.

The caption to the indictment is as follows:

"UNITED STATES OF AMERICA, } ss:
District of Kansas. }

"Be it remembered that at a term of the District Court of the United States of America, in and for the District of Kansas, begun and held at Wichita, in said District, on Monday, *the 12th day* of September, A. D. 1892, the *grand jurors* of the United States in and for said District come into open Court and through *their foreman* present a certain bill of indictment, which bill of indictment is in the following words and figures, to wit:"

The caption is defined to be that part of the record which comprehends the judicial history of the cause to the finding of the indictment.

Bishop on Crim. Practice, Sec. 657.

It is said that the record of the lower Court does not, in the English practice, contain a separate caption for each case, but there is one general caption for the whole session or term of Court; and should the record of several distinct cases be sent up to a higher tribunal, the caption for each of them is taken from this one general caption.

1 Bish., Crim. Prac., Sec. 659.

Such is largely the American practice. The better and more approved practice seems to be, however, to have one general caption for all indictments returned into Court at one and the same time.

Whenever a cause is removed from a Court of limited jurisdiction to a Superior Court, the indictment should be preceded by a caption, giving a history of the proceedings, describing the Court before which the indictment was found, showing its organization, the selecting, empaneling and swearing of the grand jury; the time when the indictment was found and returned into Court, and usually shows that the statutory number of grand jurors were present when the indictment was returned into Court.

The State of Kansas constitutes one judicial district, divided into three divisions.

By Act of Congress, June 9, 1890, 26 Statutes, 129, it is provided: "That the Judicial District of Kansas be divided into two divisions, *which shall be known* respectively as the *First* and *Second* Divisions of the District of Kansas." By Act May 3, 1892, 27 Statutes, 24, a third division was created, by dividing the First Division into two divisions, to be known as the First and Third Divisions. The Second Division embraces forty Counties, including Wichita County. A term of the Circuit and District Courts for said Division is required to be held therein at the *City* of Wichita on the first Monday of March and the second Monday of September of each year.

The caption as shown above does not recite or state anywhere the Division of the District in which the Court was held; nor does it show that the Court was held at the *City* of Wichita. True it says, "at a term of the District Court of the United States of America *in and for the District of Kansas*, begun and held at *Wichita* in said District," but it does not say "at the *City* of Wichita." The caption would be true if the Court was held anywhere in Wichita County, or at Wichita River. The law says the Court shall be held "at the *City* of Wichita."

There is nothing in the caption which shows the organization of the Court, or who composed the Court, or who were present as constituent parts thereof, when the indictment was returned into Court.

It does not appear either who composed the grand jury, or

how many grand jurors were present when the indictment was returned into Court.

Section 2021, Revised Statutes, says: "No indictment shall be found, nor shall any presentment be made, without the concurrence of at least twelve grand jurors."

This is a jurisdictional fact that shonld be made to affirmatively appear by the record; especially as the case comes up from a Court of limited jurisdiction, with no common law powers. Yet this fact does not appear either by the caption or elsewhere in the record.

The Statute declares that: "It shall be the duty of every District Attorney to prosecute in his District all delinquents for crimes and offences cognizable under the authority of the United States." Section 771, Revised Statutes.

The caption does not show that the District Attorney, or any Assistant District Attorney, was present when the bill of indictment was returned into Court. True, the indictment is signed by P. L. Soper, Assistant U. S. District Attorney, but the caption does not show that he was present. And we know no authority for an Assistant District Attorney signing his own name to a bill of indictment. He may sign his principal's name by him, but there is no law authorizing an Assistant District Attorney to prosecute delinquents for crime in his own name.

The Statute authorizes the Attorney General to employ and retain such attorneys and counselors as he may think necessary "to assist the District Attorneys in the discharge of their duties." Section 363, Revised Statutes.

It should certainly be made to appear in the caption that the Court was legally organized, and that there were present at the time the indictment was returned into Court, all the officers required by law to constitute the Court, and necessary to carry on a prosecution. This is especially true of Courts of limited jurisdiction, as is the Court below. If the District Attorney was present by his assistant, this fact should have been made affirmatively to appear. For the defects in the caption we conclude that it does not sufficiently appear that the Court was legally

organized, or that it had any jurisdiction over the plaintiff in error, or the alleged crime.

We now proceed to the consideration of the indictment itself, and will consider it by paragraphs.

The first paragraph in the introductory part is as follows:

"THE UNITED STATES OF AMERICA, } ss:
District of Kansas. }

"In the District Court of the said United States, in and for the said District, September Term, 1892.

"THE UNITED STATES OF AMERICA, }
vs. } Indictment for Perjury.
ANTON CAHA. }

(Whose more full Christian name is unknown.)

"At the term of the District Court of the United States of America, in and for the said District of Kansas, begun and held at *Wichita*, in said District, in the *fifth* day of September, in the year of our Lord, one thousand eight hundred and ninety-two, the grand jurors of the United States of America, duly impaneled, sworn and charged to inquire of offenses *committed within that part of the Indian Territory lying north of the Canadian river, and east of Texas and the one hundredth meridian, not set apart and occupied by the Cherokee, Creek and Seminole Indian tribes*, upon their oaths do find and present, that at and within that part of the public domain *acquired by the United States of America by the Act of Congress approved March 2, 1889, commonly known as Oklahoma*, and being a part of the District of Kansas, on the 3d day of January, in the year of our Lord, one thousand eight hundred and ninety, at that part of the District of Kansas aforesaid, the same being a place and district of country under the exclusive jurisdiction of the United States, and within the jurisdiction of this Court, in the United States Land Office at Kingfisher, in said part of the District of Kansas aforesaid, of which said land office J. V. Admire was then and there the duly appointed, qualified and

acting receiver, and J. C. Roberts was then and there the duly appointed, qualified and acting register of said land office, a certain land contest and cause was pending and then and there came on to be tried, wherein one Thomas Burch having before that time, to wit, on the 9th day of May, 1889, filed his affidavit of contest in said land office, wherein he, the said Thomas Burch, contested the homestead entry of one Anton Caha to the northwest quarter of section twelve, in township eleven north, of range five west of the Indian meridian, which said land then and there *laid* within the jurisdiction of the Kingfisher land office district, and within the jurisdiction of the register and receiver of said land office at Kingfisher, and sought to have the homestead entry of the said Anton Caha, which homestead entry had before that time, to wit, on the 25th day of April, 1889, been filed by the said Anton Caha at the United States Land Office, duly created and located at Kingfisher, in that portion of the District of Kansas aforesaid, canceled and forfeited to the United States, for the reason that he, the said Anton Caha, had made said homestead entry contrary to the laws of the United States, and was not entitled to said land for the reason that he, the *said Anton Caha, had violated the proclamation of the President of the United States, dated the 23d day of March, 1889.*"

T. R., 6, 7.

It will be observed that no reference is made to the Division of the District in which the Court is held, nor is the place where it was held designated with any more particularity than in the caption.

The caption recited that the Court was begun and held "*on Monday, the 12th of September*, A. D. 1892," while the indictment recites that the Court was begun and held "*on the fifth day of September.*" The Statute says a term of the Court shall be held on the "second Monday of September of each year." The 5th day of September could not be the second Monday, and hence there could have been no authority for holding a Court on September 5, 1892.

The indictment recites that the grand jury was "impaneled, sworn and charged to inquire of offenses committed within that part of the Indian Territory lying north of the Canadian river," &c. From this we understand at a term of that Court a grand jury was empaneled to inquire of offenses committed, not throughout the District, nor the legally established Division of the District, but for a specified limited part of the District or Division of the District. This appears to be rather an unusual proceeding, if indeed, there be any law to empanel a grand jury to inquire of offenses committed in a very small part of the Territory over which the Court had jurisdiction. But the grand jury was to inquire of offenses committed within a certain part of the Indian Territory, and were not to inquire of offenses committed in Oklahoma Territory.

Oklahoma Territory was organized by an Act of Congress of date May 2, 1890, and had therefore existed as a separate and distinct Territory for more than two years, when this grand jury was empaneled to inquire, not of offenses committed in that section of country which, at and before May 2, 1890, constituted that part of the Indian Territory lying north of the Canadian river, &c., but the inquest was to extend only to that part of the then Indian Territory lying north of the Canadian river, &c., and we must conclude from the language employed that the inquest was limited to what was, at the time the grand jury was empaneled, included in the Indian Territory. It will be borne in mind that at that time, and now, a large part of the Indian Territory lies north of the Canadian river, and east of Texas and the 100th meridian.

Having stated the section of country over which the inquest was to extend, the grand jury "*find and present that at and within that part of the public domain acquired by the United States of America by the Act of Congress approved March 2, 1889, commonly known as Oklahoma*," &c. The United States never acquired any public domain within its history by an Act of Congress, much less did it acquire any public domain by an act approved March 2, 1889. It is possible that the pleader

was referring to the general appropriation act, approved March 2, 1889, which, among other things, provided for the payment for certain lands which the Seminole Indians had before then agreed to convey to the United States, and which provided for the opening of these lands to settlement when said Indians should release and convey the same to the United States. The Seminoles did not make that conveyance until March 16, 1889. (See proclamation of the President of March 23, 1889.) Not only did the United States not acquire title to these lands on March 2, 1889, or any other lands for that matter, but these lands were never, so far as the history of the country gives any account, "commonly known as Oklahoma." True, they now constitute a part of Oklahoma Territory, but only a small part. The Seminole lands lay north of the Canadian river and south of the North Fork of the Canadian river, while the lands acquired from the Creeks lie north of the North Fork of the Canadian river. The town of Kingfisher, to which some reference is made in the indictment, is situated in that part of the Territory acquired from the Creeks, by treaty ratified by Act of Congress, March 1, 1889, and is not located on the lands opened to settlement pursuant to Act of Congress of March 2, 1889.

This part of the indictment also refers to a land contest that was pending, and as well as we can gather, it was pending at Kingfisher, but it does not very clearly appear before whom or what tribunal it was pending. It seems that one Burch was seeking to have the homestead entry of plaintiff in error canceled "for the reason that he, Anton Caha, had made said entry contrary to the laws of the United States, and was not entitled to said land for the reason that he, the said Anton Caha, had violated the proclamation of the President of the United States, dated the 23d day of March, 1889." It is not stated in what respect he had violated the laws of the United States, or the proclamation of the President. We submit that these allegations are quite too general, as well as too vague and indefinite.

The following are some of the familiar elementary rules given, showing the certainty required in an indictment.

The law "requires that in plain and direct terms every fact which is an element in the wrong wherein the punishment to be inflicted is based, be stated with the particular certainty of language which comes from the employment of the precise terms of the law, in those cases in which they are legally more accurate than the popular forms of speech. Moreover, there must be such an averment of facts as shows, *prima facie*, guilt in the defendant; and supposing all the facts set out to be true, there is, because of the possible non-existence of some fact not mentioned, room to escape from the *prima facie* conclusion of guilt, the indictment is insufficient."

1 Bishop on Crim. Prac., Sec. 325, 508, 519.

Lord Mansfield said: "In a criminal charge there is no latitude of intention to include anything more than is charged; the charge must be explicit enough to support itself."

Rex *v.* Wheatley, 2 Bur., 1125.

The facts and circumstances which constitute the offense as charged, must be stated with precision and certainty, and every material circumstance in regard to time and place must be averred with that degree of certainty which is sufficient to exclude every other intendment.

Arch. Crim. Pld'g, 34, 381. Chit. Crim. Law, 280. Riggs Case, 4 Cushman Miss. Rpt., 51. Dillingham *v.* the State, 5 Ohio State, 280. Kit *v.* the State, 11 Humph., 167.

When the time stated in an indictment is to be proved by matter of record, the true and correct time must be laid, and is required to be proved strictly as laid, and a variance of one day in the proof has been held to be fatal.

United States *v.* McNeal, 1 Gall., 387. United States *v.* Bowman, 2 Wash. C. C. R., 328. Rhodes Case, 78 Va., 692. 2 Wharton Crim. Law, 599. Bouvier-Subject-Indictment.

The following is the second paragraph in the first count in the indictment.

"And the grand jurors aforesaid, upon their oaths aforasaid, do further find and present, that it then and there became and was a material question in said land contest and cause then and there pending in said land office, for hearing before the register and receiver of said land office, whether the said Anton Caha had entered upon or occupied contrary to law any portion of the lands open to settlement under the Acts of Congress approved on the 1st and 2d days of March, respectively, in the year of our Lord one thousand eight hundred and eighty-nine, and the proclamation of the President of the United States, dated the 23d day of March, in the year last aforesaid, and between said 23d day of March, 1889, and prior to 12 o'clock noon of the 22d day of April, in the year last aforesaid; and thereupon it then and there became necessary and was material, in order to entitle the said Thomas Burch to have the homestead entry of the said Anton Caha aforesaid canceled and forfeited to the United States, that the said Thomas Burch should establish to the satisfaction of the register and receiver of said land office so, as aforesaid, located at Kingfisher, being the land district in which said land as hereinbefore described lies, the proof of the fact that said Anton Caha had entered upon and occupied contrary to law any portion of the lands opened to settlement under the Acts of Congress approved on the 1st and 2d days of March, respectively, in the year of our Lord one thousand eight hundred and eighty-nine, and the proclamation of the President of the United States, dated on the 23d day of March, in the year last aforesaid, and between said 23d day of March, 1889, and prior to 12 o'clock noon of the 22d day of April, in the year last aforesaid; and thereupon it became and was necessary and material, in order to prevent the cancellation of the homestead entry of the said Anton Caha, that he, the said Anton Caha, should establish to the satisfaction of the land office of the United States, and to the satisfaction of the register and receiver so, as aforesaid, located at Kingfisher, in said District of Kansas, being the land district in which the lands hereinbefore described lie, the proof of the fact that he, the said Anton Caha, had not

entered upon and occupied any portion of the lands opened to settlement under the Acts of Congress approved on the 1st and 2d days of March, respectively, in the year of our Lord one thousand eight hundred and eighty-nine, and the proclamation of the President of the United States, dated the 23d day of March, in the year last aforesaid, and between the 23d day of March, 1889, and prior to 12 o'clock noon of the 22d day of April, of the year last aforesaid said proof then and there being material and necessary to defeat said contest, and to prevent the homestead entry of him, the said Anton Caha, from being canceled."

To what time does the "then" refer? Is it to the 9th day of May, 1889, when Burch filed his contest against Caha's entry? Or does it refer to all the time that said contest was "pening" in said land office? Can it be said certainly to what time the "then" does refer? When more times than one have been mentioned in an indictment it is not sufficient in an allegation following, to use the words "then and there," because it is uncertain to which of the times previously named they refer.

The State *v.* Hayes, 24 Mo. 358.
1 Bish., Crim. Prac., Sec. 414.

The indictment alleges that it "was a material question in said land contest whether the said Anton Caha had entered upon *or* occupied *contrary to law* any portion of the land," &c.

The Act of Congress of March 1, 1889, provided that "Any person who may enter upon any part of said lands in said agreement mentioned prior to the time that the same are opened to settlement by Act of Congress, shall not be permitted to occupy or to make entry on said lands, or lay any claim thereto." This referred to the lands acquired from the Creeks. 25 Statutes, 757.

The act of March 2, 1889, provided that "until said lands are opened to settlement by proclamation of the President, no person shall be permitted to enter upon *and* occupy the same: and no person violating this provision shall ever be permitted

to enter any of said lands or acquire any right thereto." 25 Statutes, 1005.

Here are two separate and distinct acts of Congress, with dissimilar provisions. By the first, no one who should *enter* upon any part of the lands acquired from the Creeks before the day to be fixed by the President for opening the same for settlement, should be permitted to occupy or to make entry of such lands," that is, the lands acquired from the Creeks—not that such person could not occupy or make entry of any part of the public domain of the United States. The prohibition extended only to the particular lands acquired from the Creeks. By the act of March 2, 1889, no one who should enter upon *and* occupy the Seminole lands should "ever be permitted to enter any of said lands or acquire any right thereto." In the first act, any person who should "*enter*" the Creek lands until the same were opened for settlement should "not be permitted to occupy or to *make entry* of such lands," while by the second act, "no person who should enter upon *and* occupy the same" should "ever be permitted to *enter* any of *said* lands or acquire any right there."

By reference to a township map of Oklahoma, it will be seen that the land it is alleged plaintiff in error entered, to wit: N. W. ¼ 12-11, N., 5, W., lies south of the North Fork of the Canadian river, and is therefore a part of the lands acquired of the Seminoles. In order, therefore, to authorize the cancellation of the homestead entry of plaintiff in error, it was necessary to establish that he had entered upon *and* occupied some part of these lands, and it could not be a material question to the contest issue, whether he "had entered upon, *or* occupied the lands." It was only material if he had both "entered upon *and* occupied" these particular lands.

The indictment says: "And therefore, it *then and there* became necessary and was material in order to entitle the said Thomas Burch to have the homestead entry of the said Anton Cahn aforesaid, canceled and forfeited to the United States that the said Thomas Burch should establish to the satisfaction of

the register and receiver of said land office * * * the proof of the fact that said Anton Caha had entered upon and occupied contrary to law *any* portion of the lands," &c.

The register and receiver have no jurisdiction to cancel a homestead entry; their full power in contest cases is to hear all the testimony adduced by both sides, (with no power to pass upon its competency,) and when the testimony is all in, they are to report to the Commissioner of the General Land Office, and are expressly forbidden to take any further action affecting the disposal of the land in contest until further instructed by the Commissioner.

See Rules of Practice, 36 to 53 inclusive of Land Department.

Third paragraph of indictment.

"And the grand jurors aforesaid, upon their oaths aforesaid, do further find and present, that Anton Caha then and there was produced as a witness in behalf of Anton Caha in said land contest and cause, and as such witness in said land contest and cause was then and there duly sworn to testify to the truth, the whole truth, and nothing but the truth, in said land contest and cause, by the said J. V. Admire, he, the said J. V. Admire, receiver as aforesaid, being then and there duly authorized and empowed under the laws of the United States of America, and the regulations of the General Land Office of the United States, to administer such oath: and being then and there a witness in said land contest and cause as aforesaid, and being so duly sworn as aforesaid, the said Anton Caha did knowingly, willfully, corruptly and feloniously testify, depose and swear, among other things, in answer to certain questions material to the matter in issue, then and there first put and asked, in substance and to the effect following, that is to say:

Please describe the appearance, condition and character of that river (meaning thereby the South Canadian river) as it was on the 22d day of April as near as you can—meaning thereby the said Anton Caha.

A. The river (meaning thereby the South Canadion river) on

the day of the 22d of April, 1889, was just a few days after a large and big raise, and I (meaning thereby the said Anton Caha) think it was gradually falling. The water that we (meaning thereby the said Anton Caha and his party) had crossed on Saturday afternoon was about 40 to 50 feet wide, I judge, and direct north across the sand bar (meaning thereby the sand bar of the South Canadian river) I should think would be about 250 yards, and the water in the N. channel was about 60 yards wide, and beyond the water there was still a sand bar of about 100 feet. Direct west from our (meaning thereby the said Anton Caha and his party) camp there was a stream running across the sand bar (meaning thereby the sand bar of the South Canadian river) from S. W. to N. E., and then a sand bar (meaning thereby a sand bar of the South Canadian river) between the N. channel (meaning thereby the north channel of the South Canadian river) and the south channel (meaning thereby the south channel of the South Canadian river) on which we (meaning thereby the said Anton Caha and his party) staid until 12 o'clock noon, April 22, 1889.

Whereas, in truth and in fact, the said Anton Cana was not on a sand bar (meaning thereby a sand bar on the south side of the main channel of said South Canadian river) between the north channel and the south channel of the South Canadian river until 12 o'clock noon of April 22, 1889, but as a matter of fact he, the said Anton Caha, was at said time within the Oklahoma country; and whereas in truth and in fact, he, the said Anton Caha, did not stay on the said sand bar on the south side of the main channel of said South Canadian river until 12 o'clock noon of said 22d day of April 1889, but as a matter of fact he, the said Anton Caha had entered said Oklahoma country long prior to 12 o'clock noon of the 22d day of April, 1889, and subsequent to the 2d day of March, 1889, and also subsequent to the 23d day of March, 1889; and whereas, in truth and in fact, the said Anton Caha did not enter said Oklahama country after 12 o'clock noon of the 22d day of April, 1889, but in truth and in fact he, the said Anton Caha

had entered said Oklahoma country prior to 12 o'clock noon of the 22d day of April, 1889, and subsequent to the 2d day of March, 1889, and subsequent also to the 23d day of March, 1889."

To what do the "then and there" occurring in the several places in this paragraph refer? Can we say, certainly and beyond all reasonable doubt, to what time and place these words relate?

The averment as to what the questions were, which were propounded to the plaintiff in error, is not very clear. The pleader, instead of preceding the question with such averments as might have tended to show what connection the *South* Canadian River had with this contest proceeding, where it was and its relation to the land entered, and how and in what manner its condition and character were material to the issue, seeks to inject into the question the inuendo, "meaning thereby the South Canadian River." Manifestly, the question propounded to the witness was:

"Please describe the appearance, condition, and character of that river as it was on the 22d day of April, as near as you can?"

We do not know where the South Canadian River is; certainly there is no such river anywhere in the Indian Territory, as it was constituted at and prior to May 2, 1890; nor is there any such river in Oklahoma Territory. The Canadian River, which bounds the Seminole lands on the south, and the North Fork of the Canadian River, which formerly separated the Creeks from the Seminoles, are the only Canadian rivers found on the maps, or referred to in the Indian Treaties, or mentioned in the Acts of Congress, or by the President in his Proclamation of March 23, 1889. Not knowing, or having any information afforded by the indictment, where the "*South* Canadian River" is, we are wholly unable to discern how or in what manner its appearance, condition and character on the 22d day of April could be material to any issue raised in the land contest case.

In that which appears to be an answer to the question pro-

pounded, we find therein a number of innuendoes. Leaving those innuendoes out, the answer was as follows:

"The river on the day of the 22d of April, 1889, was just a few days after a large and big raise, and I think it was gradually falling. The water that we had crossed on Saturday afternoon was about 40 or 50 feet wide, I judge, and direct north across the sand bar, I should think, would be about 250 yards, and the water in the N. Channel was about 60 yards wide, and beyond the water there was still a sand bar of about 100 feet. Direct west from our camp there was a stream running across the sand bar from S. W. to N. E., and then a sand bar between the N. Channel and the South Channel, on which we staid until 12 o'clock, noon, April 22, 1889."

From the question, as it was evidently propounded, and the answer thereto, we can discern nothing material to the contest issue, and under the established rules of criminal pleading, there not having been any previous reference to the subjects and matters, injected into the answer by way of innuendoes, the same were clearly inadmissible, especially as they enlarged and expanded the answer into a statement of facts far beyond that which the witness had made.

2 Archbold's Crim. Pleading and Pract., (9th Ed.,) Sec. 181, and authorities there cited.

An innuendo is an interpretative parenthesis thrown into the quoted matter to explain an obscure term. It can explain only when something already appears on the record to ground the explanation; it cannot of itself change, add to, or enlarge the sense of expressions beyond their usual acceptation and meaning. It can interpret, but cannot add. It may serve as an explanation, but not as a substitute. Extrinsic facts, if requisite to the sense, must be averred in the introductory part of the indictment.

State *v.* Atkins, 42 Vt., 252.

But possibly the most patent defect in the indictment is found in that part which assigns the perjury. Not only did the pleader enlarge to an unwarranted extent the alleged testimony

of the defendant by many innuendoes, but in his traverse thereof he went entirely beyond everything that it is alleged the defendant had sworn. He got out on "a sand bar on the south side of the *main* channel of said South Canadian River."

There was nothing said about the "main channel" of any river either in the question or in the answer thereto; nor did the many innuendoes in the question and answer make any reference to a "main channel." We see, therefore, that the traverse of the alleged testimony of plaintiff in error is not in fact a traverse at all, but goes entirely outside of the testimony, and assigns as perjury that which the record shows the witness never swore.

The indictment also alleges that, "as a matter of fact, he, the said Anton Caha, was at said time within the *Oklahoma* country." Suppose he was; had he sworn that he was not in the Oklahoma country? If he had, it does not appear by anything that we can find in this exceedingly prolix indictment. The indictment does not allege that the place at which plaintiff in error swore he "staid until 12 o'clock, noon, April 22, 1889," was not in the "Oklahoma country." So we have another instance of an assignment of perjury, upon a matter about which the witness had not testified. Where was the "Oklahoma country," and what did it embrace from October 22, 1889, to January 11, 1892? In legal contemplation there was no such country.

It is a part of the history of the country of which the Courts will take judicial notice, that there was, at and before April 22, 1889, a large area of country in the Indian Territory that was called Oklahoma, but it had no legal existence; its boundaries were not defined or known, and, as a country, it was "without form and void." It is well known that the lands opened to settlement on the 22d day of April, 1889, pursuant to the Acts of Congress of March 1 and 2, 1889, were not co-extensive with what is now known as the Oklahoma Territory. To allege that plaintiff in error was in the Oklahoma country before noon of April 22, 1889, was not equivalent to alleging that he was within the country opened to settlement at noon April 22, 1889.

Of all that is contained in the assignment of perjury, not a single thing is alleged which traverses anything that is averred the plaintiff in error swore. He testified to nothing about being "*on a sand bar on the south side of the main channel of the South Canadian River,*" or any other river; he testified to nothing about "*the Oklahoma country,*" whether he was ever in that country or ever out of it. It is said that the assignments of perjury must be by special averment, negativing the oath or some part or parts of it.

Bish. Crim. Prac., Sec. 955, and authorities there cited.

The assignment in this case does not negative the alleged oath, or any part thereof.

We think it manifest that the indictment was wholly insufficient, and that the demurrer thereto should have been sustained.

But, if we are mistaken in this, and the indictment should be held good, then we submit that much of the testimony offered on the trial was incompetent, and, in no event, was the testimony introduced sufficient to authorize a verdict of guilty; and that the verdict should have been for the defendant.

We will, therefore, now proceed to consider the testimony as shown by the record.

It is averred in the indictment that the alleged false statements were "embodied in a written record of said contest, and then and there subscribed and sworn to by the said Anton Caha before the said J. V. Admire, Receiver of the United States Land Office at Kingfisher, aforesaid, and which said written record of contest was then and there filed," &c. The indictment, then, is based on evidence forming a part of a written record, which evidence was subscribed and sworn to by the defendant, as it is alleged. It is also averred that this evidence was taken in the trial of an issue, raised on an affidavit of contest made by one Burch, whereby he contested homestead entry of the plaintiff in error.

It is important, first, to discover, if we can, the issue upon

which the testimony was given upon which the perjury is assigned.

The affidavit made by plaintiff in error is as follows:

LAND OFFICE AT KINGFISHER STAGE STATION,
INDIAN TERRITORY, *April 25, 1889.*

I, Anton Caha, of Oklahoma Station, I. T., applying to enter a homestead, do solemnly swear that I did not enter upon and occupy any portion of the lands described and declared open to entry under the President's Proclamation, dated March 23, 1889, prior to 12 o'clock, noon, of April 22, 1889.

ANTON CAHA.

Sworn to and subscribed before me, this 25th day of April, 1889. J. C. ROBERTS, *Reg.*

The gist of that affidavit is, that the affiant did not *enter upon and occupy* any portion of the *lands described and declared open* to entry under the President's Proclamation, dated March 23, 1889, prior to 12 o'clock, noon, of April 22, 1889.

The affidavit of contest alleges that "Anton Caha *entered* the Territory known as *Oklahoma* I. T., prior to 12 o'clock noon of April 22, 1889, in violation of the Act of Congress, of March 2, 1889, and the President's Proclamation of March 23, 1889, opening said lands to settlement, and in consequence of his violation of said Act of Congress, and the proclamation made in pursuance thereof, forfeited his rights to enter any of the lands open to settlement in *Oklahoma*, Indian Territory."

The affidavit of Burch alleged that Caha was disqualified to make the entry, because he had entered the Territory known as *Oklahoma*, I. T., in violation of the Act of Congress and the President's Proclamation, and upon this Caha joined issue. Was it such an issue as would authorize an assignment of perjury upon any testimony that might be given in on the trial thereof? At that time there was no Territory known as Oklahoma, nor was there any Act of Congress prohibiting persons from going into any Territory known as Oklahoma.

It is true as stated above that there was an undefined section in and around the Indian Territory that was known as Oklahoma, but it neither had a legal existence nor defined boundry lines; it was simply a general name given to a comparatively unsettled country, the length and breadth of which had never been fixed and determined—its boundaries were all imaginary. It was not understood then or now to be co-extensive with the lands opened to settlement on April 22, 1889. There was no materiality in the issue then joined, and as a matter of law, there could be no perjury assigned on testimony given in support thereof.

The indictment declares that the issue was that Burch sought to have Caha's "entry canceled and forfeited to the United States for the reason that he said Anton Caha had made homestead entry contrary to the laws of the United States, and was not entitled to said land for the reason that he, the said Anton Caha, *had violated the Proclamation* of the President of the United States, dated 23d of March, 1889."

We find no such issue raised, and if it was, certainly there was no proof to support it.

But there is still another objection to the affidavit of contest, as evidence in support of the indictment. There seem to have been two issues raised by Burch's affidavit of contest, the only material one however, is entirely omitted from the indictment; that was the issue on the question as to who was the prior legal settler on the land. Under the homestead law as applicable to that part of the public domain that formerly lay within the limits of the Indian Territory, and now within Oklahoma Territory, there are two methods of initiating a right to a homestead, one by settlement and the other by making entry, and the first in time as to either, is the first in right.

The affidavit of contest introduced in evidence on the trial in the Court below, over the objection of the defendant, varied from the affidavit as described and set out in the indictment, and for that reason it was not competent. It does not support

the issue. It is a different affidavit from that described in the indictment. The variance was fatal.

Archbold's Crim. Prac. and Pldg., Secs. 1723, 1724.

The sixth, seventh and eighth items in the bill of exceptions show all the testimony introduced before the jury. In the eighth item it is stated "the above and foregoing being all the testimony introduced on the trial of said cause." The following shows what the testimony was:

"Sixth. An abstract of a certain record in the said land office at said Kingfisher, as aforesaid, showing the docket entries made and entered in said contest, it appearing by said record that pursuant to said affidavit of contest that the register and receiver of said land office, from the 22d day of October, 1889, to and including the 11th day of January, 1890, proceeded to hear and determine said contest, and administer oaths to witnesses in said contest, and to try and determine the issue raised by said contest affidavit upon the oral testimony of witnesses called before them and by them sworn to testify the truth, the whole truth, and nothing but the truth in said matter so claimed to have been pending before them; and that afterwards, on the 21st day of June, 1890, that said register and receiver, upon the testimony so introduced and offered by the said Thomas Burch and said Anton Caha, found the issues joined under the said contest affidavit in favor of the said Anton Caha.

"Seventh. Certain portions of written testimony in said record of said contest reduced to writing from the oral testimony of said Anton Caha on said hearing; which said portion of said written testimony is in words and figures as stated in the indictment.

"Eighth. That said plaintiff then introduced divers—sundry witnesses to testify to certain facts falsifying the testimony so proved to have been given by the defendant, Anton Caha, on said contest before said register and receiver of said Kingfisher land office as aforesaid; the above and foregoing being all of

the testimony introduced on the trial of said cause; and upon such proofs, and without offering or tendering any proofs and without the introduction of any proofs as to any directions, rules, or regulations of the Secretary of the Interior or the Commissioner of the General Land Office authorizing the holding of the contest in the case of the homestead entry by the register and receiver of the local land office, or by the register and receiver of the said land office at said Kingfisher, as aforesaid, or either or both of them, did thereupon rest his case."

The indictment avers that the land contest came on to be tried on January 3, 1890. The indictment is based on the record of the trial of the land contest case, which shows that the trial began October 22, 1889. This was a fatal variance between the proof and the indictment.

Wharton Com. Law, 759.

In United States *v.* McNeal, 1 Gall., 387, the indictment charged that the perjury was committed in the trial of a cause in the Circuit Court, held on the 19th day of May. The record introduced showed the Court to have been held on the 20th day of May. The variance was held fatal.

When the time stated in an indictment is to be proved by matter of record, a variance in the time laid in the indictment and shown by the record will be fatal, and in an indictment for perjury the day in which the perjury was committed must be truly laid.

United States *v.* Bowman, 2 Wash. C. C. Rpt., 328.
Rhodes Case, 78 Va., 692.
2 Wharton's Crim. Law., 599.

The only proof introduced before the jury as to the tribunal before which the alleged perjury was committed, and when the trial began, was the abstract of the record from the local land office Tnere was no testimony whatever as to when the defendant testified, and that abstract of record introduced was all the proof tending to show that the plaintiff in error was sworn as a witness in the land contest. The recital in the record, as shown

by the bill of exceptions is, "that the register and receiver of said land office from the 22d day of October, 1889, to and including the 11th day af January, 1890, proceeded to hear and determine said contest, and administer oaths to *witnesses* in said contest."

T. R., 27.

The 7th item in the bill of exceptions states: "Certain portions of written testimony in said record of said contest, reduced to writing from the *oral testimony* of said Anton Caha on said hearing, which said portion of said written testimony is in words and figures as stated in the indictment."

It cannot be determined from this that Caha was ever sworn, nor can it be inferred that he was ever sworn from the recital that the register and receiver "proceeded * * to administer oaths to *witnesses*." They might haye sworn some of the witnesses, but not all of them; some witnesses might have been sworn and some not sworn. It should affirmatively appear from the evidence, and be shown by the record, that Caha was duly sworn as a witness in the case, and until that does so affirmatively appear, no conviction could be legally had.

2 Archbald's Crim. Prac. and Pldg., 1744, 1745.
Rose. Crim. Ev., 675, 676.
Anonymous, 3 Mod. Rep., 116.

It should affirmatively appear not only that he was sworn, but by whom he was sworn.

While it may be true that the register and receiver proceeded to administer *oaths to witnesses* in said contest, it does not follow that they, or either of them, swore all the witnesses, or that they administered an oath to Caha.

Only the question and answer as set out in the indictment were introduced in evidence before the jury. No other parts of the testimony were introduced. It does not appear that the testimony given in before the local land office by Caha was signed by him; or if signed, neither his signature or the jurat was introduced on the trial of the case.

There is nothing to show that the "abstract of a certain record in the land office," in which abstract "the certain portions of written testimony in said record of said contest reduced to writing from the oral testimony of said Anton Caha on said hearing," was proven in any way to be a true or correct record. We are wholly uninformed as to the genuineness of the "abstract," or whether it was a correct abstract or not.

But even the "abstract" does not show when Caha gave in his testimony before the register and receiver: he might have testified on October 22, 1889, or January 11, 1890. The jury was not advised by any legal evidence before them, so far as the record before this Court shows, when Caha gave the testimony on which the perjury is attempted to be assigned, or whether he was sworn or not; or if sworn, by whom he was sworn, or when he was sworn.

If, however, we concede that the indictment is good in law, that it is distinctly laid in the indictment that Caha gave the testimony on January 3, 1890, and that there is no variance any where shown between the indictment and the proof offered and introduced, still what testimony does the record show was introduced before the jury that established the perjury? Absolutely none, so far as we can discover.

It appears that the Government "introduced divers—sundry witnesses to testify to certain facts falsifying the testimony so proved to have been given by the defendant Caha on said contest," &c. But did they testify? And if they did, what was their testimony? So far as the record discloses, all the Government did was to introduce the "witnesses to testify." It does not appear that they did so.

The record states that all the testimony given in before the Court below, is included in the record sent up to this Court. We find not a word falsifying anything that it is alleged that Caha swore, upon which the perjury was assigned.

The law requires that the defendant must be identified as the

person who took the oath on which the perjury is assigned. The day of the offense must be proved as laid.

2 Archbold, (by Pomeroy,) 1743.

Neither of the above requirements was met in this case.

It is necessary for the prosecution to prove the whole of what was set out in the assignment. Proving a part only is not sufficient.

2 Wharton's Crim. Law, (9th Ed.,) Sec. 1307.

The record says that "sundry witnesses were introduced to testify to *certain* facts, falsifying the testimony," &c. What were the "*certain facts?*" How many "certain facts?" Each witness may have been introduced to testify to a separate fact, and no two to the same fact. Perjury can not be established on the testimony of a single witness, and it is impossible to sustain this conviction without being advised as to what the witnesses actually did testify, if they or any of them, indeed, testified to anything; otherwise it cannot be determined whether the degree or quantum of proof was before the jury or not, to justify a conviction.

Wharton's Crim. Law, Sec. 1322; Wharton's Crim. Ev., Sec. 387.

It is an elementary and familiar principle in the administration of the criminal law, that every distinct element in the crime charged shall be proven and established as charged by competent evidence, and beyond all and every reasonable doubt. One element in every crime is the venue, and is declared to be a part of the crime.

Wharton Crim. Law; Moore *v.* The State, 55 Miss., 432.

There does not appear to have been any testimony before the Court below tending to prove the venue.

An abstract of a record of the land office at Kingfisher was introduced in evidence, but there was no proof that Kingfisher

was within the jurisdiction of the Court, and, of course, that could not prove the venue.

There was no proof offered as to the innuendoes contained in the indictment, and yet the truth of the innuendoes is for the jury, and they must be supported by evidence, unless they go to matters of general notoriety, or of what the Court takes judicial notice.

Wharton's Crim. Pldg. and Prac.; note to Sec. 181.

The "*South Canadian River*" is not a matter of general notoriety; no such river is known to the history of any country ever within the jurisdiction of the Court below; there is no river by that name laid down on the maps of the country.

The "*main channel of the South Canadian River*" is not a matter of general notoriety, or anything of which the Court could take judicial notice. If, therefore, it should be conceded that the "divers sundry witnesses" introduced "to testify to *certain* facts falsifying the testimony" given in by the plaintiff in error in the land contest, did falsify his testimony, still there was no proof of the innuendoes, or any pretense that the same were proven, and without such proof a verdict of guilty can not be sustained.

Without proof of the innuendoes in the case at bar, there can not possibly be anything in the testimony that even tends to show the materiality of the testimony upon which the perjury was assigned. In order to convict upon a charge of perjury it must be shown that the defendant wilfully and corruptly swore falsely in a material matter; and the materiality must be shown by evidence; it cannot be left to presumptions or inferences.

State *v.* Aikens, 22 Iowa, 403.
Wood *v.* People, 59 N. Y., 117.

We think the writ of error should be sustained, the judgment of the Court below reversed, and the indictment quashed.

Certainly the conviction is not upheld by any sufficient evi-

dence, and should it be held that the indictment is good in law, then we submit that the Court below should have instructed the jury to return a verdict of not guilty, and that it was accordingly error to overrule the defendant's motion to that effect. The motion in arrest of judgment was well taken, as was the motion for a new trial, but the case should never have advanced to that point where it was necessary to interpose either of those motions. As it did, however, it was error in the Court below to overrule either of said motions.

Respectfully submitted,

FRED . BEALL,

Of Counsel for Plaintiff in Error.

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CLERK.

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In The Supreme Court

—OF THE—

UNITED STATES.

Anton Caha,
Plaintiff in Error,

vs.

No. 15,385.

The United States,
Defendant in Error.

Brief of Plaintiff in Error

HENRY E. ASP,
JOHN W. SHARTEL, and
GEORGE GARDNER,
Attorneys for Plff in Error.

STATE CAPITAL PRINTING CO., GUTHRIE, OK.

In The Supreme Court

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UNITED STATES.

Anton Caha,
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No. 15,385.

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Brief of Plaintiff in Error.

STATEMENT OF CASE.

An indictment was found and presented to the United States district court for the second divis-

ion of the district of Kansas, sitting at Wichita in said district on the 22nd of September, 1892, in which the plaintiff in error was charged in two counts with the commission of the crime of perjury in the land office at Kingfisher, Oklahoma, on the 3rd day of January, 1890, by falsely testifying that the plaintiff in error was on a sand-bar in the South Canadian river at 12 o'clock, noon, on the 22nd day of April, 1889; that this testimony was given in a contest in which one Thomas Burch contested the homestead entry of the said plaintiff in error on the ground that the plaintiff in error had violated the act of congress of March 2, 1889, and the president's proclamation, in entering upon and occupying the lands opened to settlement under such proclamation prior to 12 o'clock, noon, of the said day; the issues described in the indictment being as to whether the plaintiff in error entered upon and occupied any of the lands opened to settlement under the proclamation of the president of March, 2, 1889, prior to 12 o'clock, noon, of April 22, 1889.

The two counts are identical in every respect, except that in the first count, it is charged that the oath was administered by J. V. Admire, the receiver of the land office, and the second count in the same terms charges that the oath was administered by J. C. Roberts, the register of such land office, and that they were

authorized to do so by the laws of the United States *and the regulations of the general land office.*

Upon this indictment a capias was ordered by the court on December 15, 1892, and on the 19th of December, 1892, a capias was issued by the clerk of the court at Topeka in said district, and on the 23d day of February, 1893, was returned into court by the marshal, the return showing that the writ was received on December 19, 1892, at Topeka. The defendant entered his first appearance in the case on the 6th of March, 1893, when he filed a demurrer to the indictment, on the grounds that the indictment does not state any offense under the laws of the United States, and that the court has no jurisdiction, and that the prosecution is barred by the statute of limitations. On the same day this demurrer was argued, overruled and excepted to.

On March 10 1893, the record shows that the defendant was present in person in court for the first time, and that he was arraigned on the indictment and entered a plea of not guilty. And thereupon a jury was impaneled in the case to try it; and on the trial and on the 11th of March, a motion to direct a verdict in favor of the defendant was filed and overruled by the court. Afterward a motion for a new trial and motion in arrest of judgment were filed

and overruled and defendant sentenced to two years in the penitentiary at Lansing, Kansas. The defendant prepared, made and presented, and duly filed his bill of exceptions taken on the trial, and prosecutes this writ of error from such judgment of conviction.

The record in the case does not show any further steps *in the trial* than the adjournment on the 10th of March, 1893. The next entry of any proceeding being had in the case is the sentence of the court pronounced on the defendant.

The bill of exceptions shows that the government introduced testimony proving the following facts:

First. That at the time charged in the indictment J. C. Roberts was the Register and J. V Admire the Receiver of the land office at Kingfisher, Oklahoma.

Second. That the defendant filed his homestead entry for a quarter section of land in Oklahoma in the local land office at Kingfisher on April 25, 1889; that on the 9th of May, 1889, Thomas Burch filed his contest in said land office, alleging that Caha entered the Oklahoma country prior to 12 o'clock noon on the 22nd of April, 1889, in violation of the act of congress of March 2, 1889, and the proclamation of the president of March 23, 1889, and in consequence thereof forfeited his rights to enter any of the lands so declared open to settlement.

Third An abstract of a certain record in the land office at Kingfisher showing the docket entries made in said contest, it appearing by said record that the register and receiver held said contest at different times and swore witnesses in the cause at different times from the 22nd day of October, 1889, to the 11th of January, 1890, and on the 21st of June, 1890, decided the case in favor of the defendant, Caha.

Fourth. Certain portions of the testimony in said contest reduced to writing from the oral testimony of said Caha on said hearing, which said portions of said written testimony is the same in words and figures stated in the indictment.

Fifth. Certain witnesses who swore that Caha was not on the sand-bar in the South Canadian river at 12 o'clock noon on the 22nd of April, and that without tendering any proofs as to any instructions, rules or regulations of the secretary of the interior or the commissioner of the general land office, authorizing the holding of the contest in the case, or other cases the government rested. Thereupon the defendant filed a motion in said court, asking the court to direct a verdict in favor of the defendant because the proofs offered were and are insufficient in law to prove any public offense against the defendant. The court overruled this motion and instructed the jury, among other things, as follows:

"The court instructs you that, as a matter of law, the register and receiver of the land office at Kingfisher, either or both of them, were duly authorized to administer oaths to witnesses upon the hearing of such contest, and were duly authorized and empowered by the laws of the United States to administer the oath alleged to have been administered to the said defendant, Anton Caha, upon said hearing of said homestead contest."

SPECIFICATION OF ERRORS.

The plaintiff in error relies for a reversal of this case upon the following special assignments of error:

1. The court erred in overruling the demurrer of the defendant to the indictment.

2. The court erred in refusing to direct a verdict for the defendant.

3. The court erred in not requiring proofs of authority of the register and receiver of the land office to hold, hear, try and determine the proceedings to contest the homestead entry.

4. The court erred in giving the instruction above quoted.

5. The court erred in overruling defendant's motion in arrest of judgment; and,

6. The record in the cause is inherently insufficient to uphold the judgment pronounced, by reason of failing to show a conviction and by reason of failing to show

the presence of the defendant during the greater part of the proceedings.

ARGUMENT.

The court erred in overruling the demurrer to the indictment. Three grounds are stated in this demurrer: First, The statute of limitations; Second; The court has no jurisdiction; Third, The indictment charges no public offense. Defendant relies in this court on the last two grounds mentioned.

Between the time of the commission of the alleged offense, and the date of finding the indictment on the 2nd day of May, 1890, congress created the Territory of Oklahoma and established courts for said territory (26 Statutes at Large, Chapter 182, page 81.) By section 9 of this act courts were created for the territory, and it is provided:

> "All acts and parts of acts heretofore enacted, conferring jurisdiction upon United States courts, held beyond and outside of the limits of the Territory of Oklahoma, as herein defined, as to all causes of action or offenses in said territory, and in that portion of the Cherokee Outlet hereinbefore referred to, are hereby repealed, and such jurisdiction is hereby given to the Supreme Court and district courts in said territory; but all actions commenced in said courts, and crimes committed in said territory and in the Cherokee

> Outlet prior to the passage of this act shall be tried and prosecuted and proceeded wih until finally disposed of in the courts now having jurisdiction thereof, as if this act had not been passed."

That this clause is somewhat obscure there can be no doubt; but what was the manifest intention of congress in the light of the context with reference to the jurisdiction remaining in courts outside of the Territory? Where is the proper place to prosecute an offense committed prior to the passage of the Organic Act of Oklahoma Territory, for which no prosecution was pending at the time of the passage of such act? It is insisted by the plaintiff in error that the act repealing all acts giving jurisdiction to United States courts outside of the Territory of Oklahoma, is general, and the exception should only be construed with a design to promote the object of this legislation, viz; to avoid confusion arising from the transfer of cases from one court to another, and the repealing clause undoubtedly refers to past as well as future—civil suits and criminal prosecutions, and would have been potent but for the exception, to have deprived the courts heretofore exercising jurisdiction outside of the Territory of jurisdiction to proceed further with the cases then pending before them. The language giving jurisdiction to the courts of the Territory

in the preceding clauses of the section as to cases arising in the future or past, is exclusive in its terms, and would have been sufficient to have deprived all other courts of any concurrent jurisdiction.

In the same section it is said:

> "Each of the said district courts shall have and exercise exclusive of any courts heretofore established, the same jurisdiction in all cases arising under the constitution and laws of the United States, as is vested in the circuit and district courts of the United States. In addition to the jurisdiction otherwise conferred by this act, said district courts shall have and exercise exclusive original jurisdiction over all offenses against the laws of the United States committed within that portion of the Cherokee Outlet not embraced within the boundaries of said Territory of Oklahoma, as herein defined."

It is quite apparent that something more was intended in this express repealing clause than merely to confer jurisdiction on the courts of the Territory of cases arising in the future.

If the exception to the repealing clause is to be construed as excepting prosecutions not commenced at the date of the passage of the act for crimes committed before, the proviso must be read with some kind of an interpolation. It would not only be ungrammatical but senseless, to say that *a crime shall be tried, prosecuted, and punished*

with until finally disposed of; and to make the meaning clear in this respect it would be necessary to make the proviso read somewhat as follows:

"All actions commenced in such courts and all prosecutions for crimes, committed in said Territory prior to the passage of this act, shall be instituted, tried, prosecuted, and proceeded with until finally disposed of in the courts now having jurisdiction thereof, as if this act had not been passed."

If the exception means what we contend for it, it should read be as follows:

"But all prosecutions commenced in such courts for crimes committed in said territory and in the Cherokee Outlet prior to the passage of this act, and all civil actions pending therein, shall be tried and prosecuted, and proceeded with until finally disposed of in the courts now having jurisdiction thereof, as if this act had not been passed."

And this we contend is the sensible construction and the intention of congress. Courts do not have jurisdiction of crimes; they have jurisdiction of prosecutions and actions; and the expression *"now having jurisdiction thereof"* clearly means a case in court. Jurisdiction cannot exist without the right to take cognizance of the controversy and an exercise of that power by the commencement of proceedings and bringing the parties before the court.

Brown on Jurisdiction, Sec. 1, *et seq.*, and cases cited.

"*The power to hear and determine a case is jurisdiction; it is coram judice whenever a case is presented which brings this power into action.*"

U. S. vs. Arredondo, 6 *Pet.* 709.

Congress recognized the necessity for local government in the community known as Oklahoma, and in the act in question recognized the capability of the citizens of that community to make and to administer their own local law as well as the laws of the United States. In this act (sec. 10) the right of a citizen to a trial by jury for infraction of local or federal law in the county where the offense was committed, was given. Why should congress design to place offenses committed prior to that time upon a different footing than those committed after, except those upon which prosecutions were then pending in other courts? The usual and ordinary provision in transferring jurisdiction from one court to another, is to save the jurisdiction already acquired in the court previously exercising such jurisdiction to enable it to determine and dispose of business at the time pending.

Except for such a proviso, the court then having jurisdiction would lose the same and complications would arise with reference to the statute of limita-

tions, and great public expense would be entailed.

Sutherland on Statutory Construction, Sec. 167.

Hallingworth vs. Virginia. 3 Dallas, 378.

Insurance Co. vs. Richie, 5 Howard, 544.

No more sacred right is recognized by the policy of the law, whether constitutional, statutory or prescriptive in its nature, than the right of trial by a jury of the vicinage, this principle is manifest in the spirit of the whole act and should be regarded as an important purpose of the act and not violated upon any ambiguous footing. The evident purpose of the saving clause in question, is manifest in avoiding the expense and complication arising from a transfer of pending cases from one court to another. We submit this proviso should not be extended beyond this purpose.

The saving clause in question is to be strictly construed (See Sutherland on Statutory Construction, Sec. 222.)

Reference should be made to the purview of the entire act of which this proviso forms a part, to aid the court in arriving at the legislative intent in the expression used. "In expounding a statute we must not be guided by a single sentence, but look to the provisions of the whole law and to its object and policy." *U. S. vs. Boisdores heirs 8 How. 519.*

The purpose of the act in question was to give

the people of the territory created the right of local self-government and all of the incidents attendant thereon. This purpose ought not to be invaded in face of contradictory expressions found elsewhere in the same act, *beyond the necessary import of such proviso.*

Did the district court at Wichita ever have jurisdiction of the crime of perjury committed in the Oklahoma country? Before the treaty of January 19, 1889, with the Creek tribe of Indians and the legislation resulting therefrom (25 St. L. 757-1004) there was no law in force in that country denouncing the crime of perjury. By section 2 of the act of January 6, 1883 (22 St. L. 400) the United States courts at Wichita and Fort Scott are given jurisdiction of *all offenses against the laws of the United States now or that may be hereafter operative therein.*

Section 4 of the same act contains a proviso that said courts shall not have any greater jurisdiction than might heretofore have been lawfully exercised by the western district of Arkansas. The western district of Arkansas never had jurisdiction to punish the crime of perjury in the Indian country.

The jurisdiction of the western district of Arkansas is derived through the act of June 30, 1834, and has always remained limited to that class of

offenses, the commission of which in the Indian country is punishable.

Section 2145 of the revised statutes defines what portion of the law of the United States shall be in force in the Indian country and even if it can be held under the peculiar circumstances surrounding the opening of the Oklahoma country to settlement; that concurrently with the extinguishment of the Indian title the whole body of the laws of the United States instantly rush into the vacum and become in force; still it would not follow that such a change worked any change in the jurisdiction of the United States district court of Wichita.

The court at Fort Smith formerly had no such jurisdiction and the repugnancy, if any in the statute conferring jurisdiction on the court at Wichita would have to be resolved in favor of the restrictive clause.

But congress evidently did not believe nor act upon any assumption of the existing laws of the United States being in force in Oklahoma country, by reason of its being merely open to settlement and the extinguishment of the Indian title; for, by the act of March 2, 1889, it was provided that land offices might be located and land districts created by the president and register and receiver appointed in conformity to existing law and again, in the act of May 2, 1890, section 28, it was provided that the constitution and all laws of the United

States not locally inapplicable shall, except so far as modified by this act have the same force and effect as elsewhere within the United States, etc., thus giving the weight of the sanction of the legislative department of the government to the view that the general body of the substantive law of the United States was not in force in that country

See, United States against Lebris. 121 United States, 278.

Exparte Crow Dog 109 United States 556.

United States against McBratney 104 United States, 621.

The indictment in question was drawn under section 5 of the act of March 3, 1857, being entitled, "An act in addition to an act more effectually to provide for punishment of certain crimes against the United States, and for other purposes." (11th Statutes at Large 250.) And the question whether the indictment stated a public offense involves the questions (1) was section 5 o the act of March 3, 1857, in force in 1890 when the offense was alleged to have been committed? and (2) If the provisions of the act referred to were not in force, was there at that time any law in force which denounced the acts of the defendant as a crime? and (3) If there was such law is the indictment drawn under that law?

Section 1 of the act referred to was carried into section 5341 of the Revised Statutes; section 2

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Section 1 of the act referred to was carried into section 5341 of the Revised Statutes; section 2

was carried into section 5342 of the Revised Statutes, and section 3 was carried into section 5343 of the Revised Statutes and sections 4 and 5 were omitted from the revision. The evidence of this fact consists of a comparison of the subject matter of the sections referred to andthe statement to that effect in the reference index published in the same volume in accordance with the act of June 27, 1866 (14 Statutes at Large, page 74) and in the side notes of the revised statutes.

By the act of June 20, 1874 (18 Statutes at Large, page 113), sections 5595 and 5596 of the Revised Statutes, it was provided:

> "SEC. 5595. That the foregoing seventy-three titles embrace the statutes of the United States, general and permanent in their nature in force on the first day of December, one thousand eight hundred and seventy-three, as revised and consolidated by commissioners appointed under the act of congress, and the same shall be designated and cited as the Revised Statutes of the United States."
>
> "SEC. 5596. All acts passed prior to the said first day of December, one thousand eight hundred and seventy-three, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof, all parts of such acts not contained in such revision having been repealed or

superceded by subsequent acts, or not being general or permanent in their nature. Provided, That the incorporation into such revision of any general and permanent provision taken from an act making appropriations, or from an act containing other provisions of a private, local or temporary character, shall not repeal or in any way affect any appropriation or any provision of a private, local or temporary character contained in any of said acts; but the same shall remain in force, and all acts of congress passed prior to said last named date, no part of which are embraced in said revision, shall not be affected or changed by this enactment."

That a part of the act of 1857 was incorporated in the revision, and that the part in question was not, admits no doubt. That the part omitted was general and permanent in its character, is also self-evident.

Sutherland Stat. Coust. Sec's. 116 and 120.

Section 5596 is a modification of the previous declaration contained in section 5595, that the foregoing chapters and titles embraced all of the general and permanent statute laws of the United States in force on the first day of December, 1873. In other words, if section 5595 was the only declaration contained in the act with reference to the repealing force of the revision, it would have constituted the sole and exclusive evidence of existing law.

Section 5596 manifested three purposes, the first of which was to rescue from repeal any act of a general and permanent character where the compilers had left no traces of examination by overlooking such act in toto; second; to rescue from the force of the repealing provisions acts or parts of acts of a private, local or temporary character, and third; unexpired appropriation acts.

Congress imposed no check on the judgment and judicial acumen of the compilers in unraveling problems of express or implied repeal, but did throw out a single check against complete oversight of acts general and permanent in their character remaining in force on December 1, 1873, no part of which was carried forward into the revision. The revision is not a species of implied repeal, but is a mode of express repeal, depending upon precision and mathematical certainty for its ascertainment. If the compilers left their footprints upon an act, that portion not carried into the revision is repealed. Such, undoubtedly have been the views of this and various inferior federal courts.

U. S. vs. Bedgood, 49 *Fed. R.* 54.
U. S. vs. Claflin, 97 *U. S.* 546.
U. S. vs. Grattkau, 30 *Fed. R.* 672.
U. S. vs. Bowen, 100 *U. S.* 508.
Arthur vs. Dodge, 101 *U. S.* 34.
Cambria Iron Co., vs. Ashburn, 118 *U. S.* 54.

Deffebach vs. Hawke, 115 *U. S.* 402.
The Marine City 6 *Fed. R.* 413.
The Montana 22, *Fed. R.* 715.

By the act of March 13, 1874, and between the presumptive and the actual date of the passage and taking effect of the act adopting the revised statutes, Congress amended the timber culture law, and by that act provided that the fifth section of the act entitled "An act in addition to an act to punish crimes against the United States, and for other purposes," approved March 3, 1857, "shall extend to all oaths, affirmations and affidavits required or authorized by this act." This language was repeated in the amendment to the act passed on June 4, 1878. (20 Statutes at Large, page 113.)

In contemplation of law, the act referred to, is repealed by the revision, was not in force at the date of the passage of the timber culture law and presented a case of applying the provisions of an act not in existence to powers thereby created. Whether this act was a sufficient exercise of legislative power to breathe life into the act of 1857 for any purpose whatever, it is needless to inquire; but the most that can be said is that it revived, and continued section 5 of the act of 1857, in force only as to timber culture claims. And we therefore

respectfully submit that no prosecution can be predicated upon section 5 of the act of 1857.

The next inquiry is, was there sufficient authority for the prosecution outside of the law of 1857? Can be said that Section 5392 of the Revised Statutes embraces in its provisions and provides a punishment for the acts charged against the defendant? Under that section the essential elements of the crime of perjury are, that the oath must be taken before a competent tribunal, officer or person; that it must be taken in some case in which the law of the United States authorizes the oath to be administered, and that the person after taking such oath wilfully testifies to some material matter which he does not believe to be true.

There is no law of the United States authorizing the register and receiver of the land office to hear and determine a contest upon any other ground or consideration than abandonment of possession

There is no law of the United States which authorizes the register and receiver to hear and determine such a contest as is described in the indictment, nor to administer oaths to witnesses in the hearing of such a contest.

If the prosecution can be upheld under section 5392 it will necessarily have to be under a derivative and mediate authority and not upon the immediate sanction of any law authorizing an oath of the character in question to be administered.

We submit that, this cannot be done; this would be the creation of an offense and providing the punishment for its commission by indirection and implication.

In the case of the United States against Lacher 134, United States, page 628, the Supreme court says: "Before a man can be punished his case must be plainly and unmistakably within the language of the statutes." This same doctrine is again announced in United States against Brewer, 139 United States, page 288.

By section 2246, the register or receiver is authorized "And it shall be their duty to administer any oath required by law or the *instructions* of the general land office in connection with the entry or purchase of any tract of the public lands."

Can the allegation that the said receiver has authority, being then and there duly authorized and empowered under the laws of the United States to administer such oath, meet the requirement contained in section 5392, in any case in which the law of the United States authorizes an oath to be administered? Does not that clause mean the direct and immediate declaration of that law, and not by virtue of the declaration made by a department in pursuance of a power conferred by law?

Counsel for plaintiff will undoubtedly rely in this court as was done in the court below, on the case of the United States vs Bailey (9 Peters 238)

to bring this case within the meaning of section 5392.

The distinction between the statutes under consideration in that case and the one at bar, would seem to be plain. In the Bailey case the statute denounces the crime of *false swearing* in its moral aspect, and in the present case the statute denounces the crime of *perjury* in its legal aspect. In the one case the crime is one of conscience and *de facto* authorities in power exercised are sufficient to complete the crime. In the other the crime is one against the administration of law in tribunals legally and rightfully constituted and in the rightful exercise of powers conferred by law. In other words, the case at bar is a prosecution for perjury and the Bailey case was a prosecution for false swearing, and the distinction rests in the different class of principles applicable to the two crimes.

We are next to consider whether, under the rules of construction which are applied to criminal statutes, the charge in the indictment is embraced within the provisions of sections 5392 and 2246? Section 2246 provides, that the register and receiver shall administer oaths required by law or the instructions of the general land office. The charge in the indictment is, that the oath was administered pursuant to *regulations* of the general land office. There is a marked and well de-

fined difference between "instructions" and "regulations." Regulations of the general land office are those rules which are adopted for the guidance and control and management of that office. Instructions of the general land office, in the sense in which the word is used in this connection, are those orders, commands, or directions which are, issued from the general land office, as the superior, to the local land office as the inferior body.

Regulations apply to the conduct of the business of the general land office. Instructions apply to the conduct of the business of the local office.

Webster says: that, "an instruction, is a direction; order; command; mandate." Webster says that a regulation is, "a rule or order prescribed for management or government."

Rapalje and Lawrence Law Dictionary, says: that instructions are "directions given by the principal to his agent."

The indictment should have charged that the contest was conducted under the instructions of the general land office, and those instructions should have been set out in the indictment so that the court could see what they were and whether they warranted the institution of the contest of the nature described in the indictment.

Again the bill of exception shows (see pages 28 and 29) that no proof was introduced of any regulations or instructions of the general land office or

of the interior department, authorizing the register and receiver of the land office in question, or of any other land office, to constitute themselves a tribunal to hear and determine the controversy concerning the homestead entry in question between Burch and Caha. There was an attempt to plead it and it should have been proven. It was a material fact in the case. If a sufficient warrant of law existed for the prosecution, even under such circumstances, it was incumbent upon the government to prove such regulations as any other fact. See *United States vs. Mainon, 44 Federal 800.*

The court's attention was challenged to this question by the motion for a verdict (see page 29) and an exception to the charge of the court above set forth.

And lastly, it is respectfully submitted that the record in the case is insufficient to uphold the judgment pronounced against the defendant. The record entries in the case, as shown by the transcript, are as follows:

On December 15, 1892 (see page 14 of printed record), a capias was ordered to be issued for the apprehension of the defendant.

On March 6, 1893 (page 15 of printed record), is an entry showing the demurrer to the indictment was argued, and overruled and excepted to. The defendant was not shown to have been present,

but the record in question shows in fact, that the defendant was personally absent.

On page 16 of the printed record, on March 10, 1893, the record shows that the defendant was arraigned, pleaded not guilty, a jury was impaneled, and the trial of the cause proceeded with, adjournment having been taken until the succeeding day for the further hearing of the case.

No further statement is contained in the record as to what the outcome of the case was or any further proceedings had in the case. On the same page appears the following matter: "We, the jury in the above entitled cause, duly impaneled and sworn, on our oaths, find the defendant Anton Caha guilty as charged in the indictment. Henry Wallenstein, Foreman.

This verdict is not entitled in any cause nor in any court, and was not filed, and, indeed, the record does not show that any verdict of conviction was ever returned by the jury.

The next record entry of the case appears under date of March 31, 1893, (see printed record, page 19) that the case was called up on motion of the district attorney for the sentence; that the court passed sentence on the defendant of imprisonment in the Kansas penitentiary for two years, and that he pay a fine of $10, and the further order concerning the suspension of the sentence in the event of the defendant giving bond.

The entry does not show that the defendant was present, but merely "now come the parties same as before," a statement which can be met either by the presence of the defendant or of the appearance of counsel, as disclosed by the previous state of the record.

An entry under date of April 1, 1893, shown on pages 19 and 20 of the record, shows that the motion for a new trial and the motion in arrest of judgment, were overruled. On this occasion the defendant is shown to have been personally present.

We submit that this record is insufficient to uphold the judgment of conviction, by reason of failing to show a conviction and by reason of failing to show that the defendant was present during the previous stages of the proceedings and by reason of failing to show that the defendant was present in person at the time the judgment was pronounced.

See Hoft vs. People of Utah 110 U. S. 574.
Ball vs. United States 140 U. S. 118.
Lewis vs. United States 146 U. S. 370.

Respectfully submitted,

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Office Supreme Court U. S.
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JAMES H. McKENNEY,
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CASE NO. 15385.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

ANTON CAHA, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
} No. 1001.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF FOR DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

ANTON CAHA, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 1001.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF FOR DEFENDANT IN ERROR.

The plaintiff in error was indicted September 22, 1892, for perjury, charged in the indictment to have been committed January 3, 1890, in a contest concerning a land title in Oklahoma then pending before the register and receiver of the land office. He was tried before Judge Williams and a jury, and sentenced March 31, 1893.

STATEMENT OF FACTS.

The land in controversy was the NW. ¼ of section 12, township 11 N., range 5 W., Indian meridian. It is admitted by plaintiff in error (Brief of Messrs. Beall, p. 15), and shown by the map of Oklahoma that this land

is a part of the lands acquired by the United States from the Seminole tribe of Indians by the agreement of 1889.

The Seminole treaty of August 16, 1866 (14 Stat., 755, 756), cedes to that nation a certain district of country between the north and the south (or main) fork of the Canadian River, which had been ceded to the United States by the Creek nation by a recent treaty. Apparently, however, the land was never actually occupied by that tribe.

By section 12 of the Indian appropriation act of March 2, 1889, chap. 412 (25 Stat., 1004–5), appropriation was made for the purchase of these lands from the Seminole nation, and section 13 of the act provided as follows:

> That the lands acquired by the United States under said agreement shall be a part of the public domain, to be disposed of only as herein provided. * * * That the lands acquired by conveyance from the Seminole Indians hereunder * * * shall be disposed of to actual settlers under the homestead laws only. * * * But until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto.

The conveyance provided for in this act was actually made on March 16, 1889 (26 Stat., 1545).

President Harrison thereupon, on March 23, 1889, proclaimed that the land in question, together with certain land conveyed by the Creek nation,

> Will, at and after the hour of twelve o'clock noon of the twenty-second day of April next, and not before,

> be open for settlement under the terms of and subject to all the conditions, limitations, and restrictions contained in said act of Congress approved March 2, 1889, and the laws of the United States applicable thereto.
>
> * * * * *
>
> Warning is hereby again expressly given, that no person entering upon and occupying said lands before said hour of twelve o'clock noon of the twenty-second day of April, A. D. 1889, hereinbefore fixed, will ever be permitted to enter any of said land or acquire any rights thereto; and that the officers of the United States will be required to strictly enforce the provision of the act of Congress to the above effect.

The territory thus opened is shown on all recent maps. Its main boundary to the southward is the main or south fork of the Canadian River. The precise boundary at this point is the middle of the main channel of the river. (26 Stat., 1546.)

Anton Caha, plaintiff in error, on April 23, 1889, made his written application to the land office at Kingfisher under the homestead act (Rev. Stat., § 2289) for the land in question, filing therewith his affidavit that he "did not enter upon and occupy any portion of the lands described and declared open to entry under the President's proclamation dated March 23, 1889, prior to 12 o'clock noon of April 22, 1889." On April 25 Caha procured from J. V. Admire, the receiver of the land office, a receipt for the register's and receiver's fees, and from J. C. Roberts, register of the land office, a certificate that he was legally entitled to the land applied for. (Rec., pp. 24, 25.)

On May 9, 1889, one Thomas Burch filed with the register an affidavit of contest, claiming that Caha "entered the territory known as Oklahoma" prior to noon of the day mentioned, and thereby "forfeited his rights to enter any of the lands declared open to settlement in Oklahoma, Indian Territory" (p. 26).

On October 22, 1889, Receiver Admire issued a summons based on Burch's affidavit requiring the parties to appear at the land office "to respond to and furnish testimony concerning all the allegations in said affidavit;" and on the same day Caha, by his attorney, waived service of the summons, entered his appearance, and waived all defects, if any (p. 27).

Thereupon the register and receiver "proceeded to hear and determine said contest and administer oaths to witnesses in said contest, and to try and determine the issue raised by said contest affidavit upon the oral testimony of witnesses called before them and by them sworn," etc. The trial ended January 11, 1890 (p. 27). Among others Caha gave oral testimony on this hearing, and in his testimony appear the following question and answer:

> Q. Please describe the appearance, condition, and character of that river as it was on the 22nd day of April, as near as you can.
>
> A. The river on the day of the 22 of April, 1889, was just a few days after a large and big raise, and I think it was gradually falling. The water that we had crossed on Saturday afternoon was about 40 to 50 ft. wide, I judge, and direct north across the sand bar, I should think, would be about 250 yds., and the water in the N. channel was about 60 yds. wide, and beyond the water there was still a sand bar of

about 100 ft. direct west from our camp. There was a stream running across the sand bar from SW. to NE., and then a sand bar between the N. channel and the south channel, on which we staid until 12 o'clock noon, April 22, 1889 (pp. 8, 12).

This question and answer are alleged by the indictment (pp. 8, 11, 12) to be material to the issue. It is also alleged in the indictment, in the form of innuendo, that the river referred to was the South Canadian River, and that the sand bar referred to was a sand bar on the south side of the main channel of said South Canadian River (pp. 8, 12).

It is in this answer that the perjury is charged, as to which the bill of exceptions contains the following statement:

> That said plaintiff then introduced divers (——) sundry witnesses to testify to certain facts, falsifying the testimony so proved to have been given by the defendant, Anton Caha, on said contest before said register and receiver of said Kingfisher land office as aforesaid (p. 28).

Before the trial the prisoner demurred to the indictment for insufficiency "to constitute any offense under the laws of the United States," for lack of jurisdiction of prisoner or cause, because the offense was not committed within the jurisdiction of the court, and on the ground of the statute of limitations (p. 15). This demurrer was thereupon overruled.

The only objection on the evidence was made to the introduction of Burch's affidavit of contest and the notice

thereupon issued. This objection was based on a claim of variance from the indictment, and was overruled, defendant excepting (p. 28).

At the close of the prosecution's testimony defendant moved for a direction of a verdict:

> Which motion was in writing and specified the reason therefor the omission of the plaintiff to prove any authority for the said register and receiver constituting themselves tribunals to hear and determine said contest and examine witnesses under oath touching the truth or falsity of said contest affidavit; upon said proposition no proofs whatever were offered, no evidence given, no rules or regulations of the Commissioner of the General Land Office or the Secretary of the Interior, or either or both of them, authorizing or directing the register or receiver, or either of them, of said land office, or of any other land office, to hear, try, and determine such issues or administer oaths to witnesses upon such matters arising in such local land office nor arising before the register and receiver of the land office at said Kingfisher as aforesaid, either in such controversies generally or in the controversy between the said Thomas Burch and the said Anton Caha as aforesaid (p. 29).

The court denied the motion. Defendant excepted, and thereupon rested without introducing any testimony on his own behalf. The court then instructed the jury as follows:

> Gentlemen of the jury: The court instructs you that as a matter of law the register and receiver of the land office at Kingfisher, either or both of them, were duly authorized to administer oaths to witnesses upon the hearing of such contest, and were duly authorized and empowered by the laws of the United

States to administer the oath alleged to have been administered to the said defendant, Anton Caha, upon said hearing of said homestead contest (p. 29).

The jury having found a verdict for the prosecution, defendant moved in arrest of judgment on the ground that the indictment was insufficient for the first reason alleged in the demurrer. This motion was also denied and defendant excepted (pp. 18–19, 30).

A motion for a new trial appears on page 18 of the record, but this is not made the basis of any assignment of error, nor could it be. (*Moore* v. *United States*, 150 U. S., 57, 61–2.)

It will be noticed that at page 16 of the printed transcript appears a written motion for verdict stated as having been made at the trial and based on three different grounds. There is no statement of any exception to the denial of this motion, nor does it even appear that the motion was denied. It is difficult to reconcile this passage with the detailed statement of the motion in the bill of exceptions at pages 28–9. Perhaps the motion printed at page 16 was the one in form made, while, in order to save the expense of printing the evidence at length in the bill of exceptions, the real ground of the motion was therein alone set forth and the other grounds dropped. However this may be, we shall discuss only the grounds stated in the bill of exceptions for the following reasons: That this is the only motion upon which an exception is based, and an exception is necessary to review in this court (*United States* v. *Breitling*, 20 How., 252, 254; *Poole* v. *Fleeger*, 11 Pet., 185, 212; *Walton* v. *United*

States, 9 Wheat., 651; *Scott* v. *Lloyd*, 9 Pet., 418, 442; *Hutchins* v. *King*, 1 Wall., 53, 60; *Stanton* v. *Embrey*, 93 U. S., 548, 555; *Alexander* v. *United States*, 138 U. S., 353, 355); that the assignment of error distinctly limits the objection to "the action of the court in overruling the defendant's motion * * * for the reasons stated in said motion for said verdict as fully set forth *in the bill of exceptions*" (p. 3); and that thus specifying the grounds waives all other grounds of objection that might have been taken (*Evanston* v. *Gunn*, 99 U. S., 660, 665, and cases cited; *Belk* v. *Meagher*, 104 U. S., 279, 289). Under these circumstances, indeed, it is altogether unfair to the judge who settled the bill of exceptions to attempt, as plaintiff in error does here in one of his briefs, to pick flaws in the evidence as set forth in the bill, as by claiming that there is no proof that Caha was sworn on the hearing, and no proof that his testimony under discussion was material to the contest proceeding.

ASSIGNMENT OF ERRORS.

The assignment of errors required by rule 35 is contained at pages 3–5 of the transcript of record.

It will be noticed that one of the briefs filed for plaintiff in error abandons the assignment of errors entirely and bases itself upon alleged omissions and errors of the most technical character: such as that the caption of the indictment did not state in which division of the district the court was held; or how many grand jurors were present; or that the district attorney was present; that, although the term at which the indictment was filed began Septem-

ber 12, 1892, the grand jurors misrecite the date and make it September 5, 1892; that although they were alleged in the caption to be a grand jury for the whole district, they claim only in their bill of indictment to have been impanelled for a part of the Indian Territory; that they call the south or main fork of the Canadian River the "South Canadian River," etc. As to the required form of indictment, see Rev. Stat., § 5396.

We shall not discuss these technicalities, both because no objection has ever been taken on any of these grounds and because by section 1025 of the Revised Statutes—

> No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.

Applying this section to a perjury case in *Babcock* v. *United States*, 34 Fed. Rep., 873, 876, Mr. Justice Brewer said:

> Can anything be clearer than that the defendant knew precisely what he was charged with, and that there was no doubt or uncertainty in the matter?

ARUGMENT.

I.

The first assignment of error is to the overruling of the demurrer to the indictment.

The first reason stated is that the indictment does not state facts "sufficient to constitute any offense under the laws of the United States." We understand that this objection

was partly based on the proposition that the act of March 2, 1889, and the President's proclamation thereunder did not prevent proposed settlers from entering the Territory prior to noon of April 22, 1889, provided they did not "'enter upon and occupy" the land claimed by them prior to that time. This question is now settled by the recent decision of this court, speaking through Mr. Justice Brewer, in *Smith* v. *Townsend*, 148 U. S., 490. It is suggested that the facts showing materiality of the evidence are not sufficiently stated; but the allegation of materiality was sufficient for the purposes of the indictment. (2 Bishop, Crim. Pro., § 921, and cas. cit.; *Comm.* v. *McCarty*, 152 Mass., 577; *Lea* v. *State*, 64 Miss., 278; *Gandy* v. *State*, 23 Nebr., 436, 442.) The other ground of objection in this regard will be discussed in connection with the motion for a verdict under the next head.

The second and third reasons specified in the demurrer, namely, "that the said court has no jurisdiction of the person of the said defendant nor of the subject matter of the said prosecution," and "that said offense was not committed at any place within the jurisdiction of this court," are partly based on the theory that as the defendant resided and the offense was committed in the present Territory of Oklahoma, the court's jurisdiction was taken away by the act organizing that Territory. But the Oklahoma Act of May 2, 1890, chap. 182, § 9 (Suppl., p. 24, foot), referring to the "United States courts held beyond and outside the limits of the Territory of Oklahoma," provided as follows:

> But all actions commenced in such courts, and crimes committed in said Territory and in the Cherokee

> Outlet, prior to the passage of this act, shall be tried and prosecuted, and proceeded with until finally disposed of in the courts having jurisdiction thereof, as if this act had not been passed.

We read this section as meaning just what it says, namely, that "all * * * crimes committed in said Territory * * * prior to the passage of this act shall be * * * prosecuted * * * in the courts having jurisdiction thereof as if this act had not been passed." The draftsmen of the statute were a little unfortunate in their attempt to compress the civil and criminal provisions into the same sentence; they put the verb "prosecuted," relating to crimes, between the two verbs "tried" and "proceeded with," relating to actions, instead of after both. Caha's strained construction of the statute seems, however, quite gratuitous.

Section 5392, making perjury a crime, extends to all the territory under control of Congress. Section 2145 does not state the only crimes applicable to the Indian country, as plaintiff in error supposes; nor is section 5392, as plaintiff in error supposes, applicable only in the States, and not "in any place within the sole and exclusive jurisdiction of the United States."

The court properly took judicial notice of the fact that the spot in question was within its jurisdiction. (*Hoyt* v. *Russell*, 117 U. S., 401, 404.)

The fourth and last reason specified in the demurrer to the indictment was the statute of limitations. This, however is a three-years' statute (*Act of April* 13, 1876, chap. 56.) The perjury is charged to have been committed on

January 3, 1890, and proved to have been committed in the course of a hearing which commenced October 22, 1889. The indictment was filed September 22, 1892. The objection is abandoned in this court.

II.

The second assignment of error (p. 3) brings into question the reasons stated by the court for denying defendant's motion for a verdict. (P. 29.)

The specific ground stated is that there is no proof of any rules or regulations of the General Land Office or Interior Department authorizing the register and receiver to examine witnesses under oath in such land contests. This objection raises two questions: first, whether the court could take judicial notice of the regulations since they were not proved on the trial; and, second, whether the regulations actually existing sufficiently support the prosecution for perjury in the present case.

§ 2246 of the Revised Statutes is as follows:

> The register or receiver is authorized, and it shall be their duty, to administer any oath required by law or the instructions of the general Land Office in connection with the entry or purchase of any tract of the public lands; but he shall not charge or receive, directly or indirectly, any compensation for administering such oath.

§ 5392 of the Revised Statutes provides as follows:

> Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare,

depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished, etc.

No special provision of law relates to the administration of oaths in land-contest cases, but the matter is regulated by the general rules of practice of the General Land Office, which were codified by Commissioner Sparks and approved by Secretary Lamar, August 13, 1885, and are still the code of regulations of that subject. Rule 1 provides for contests in case of adverse claims relating to the public lands. Rule 2 provides that the contest shall be instituted by filing an affidavit with the register and receiver. Rules 7 and 8 provide for a thirty days' notice of contest under such affidavit. Rule 36 provides that "Upon the trial of a cause the register and receiver may in any case, and should in all cases when necessary, personally direct the examination of the witnesses," etc. Rule 40 provides that "Due opportunity will be allowed opposing claimants to confront and cross-examine the witnesses introduced by either party." Rule 41 relates to rulings upon objections to "testimony" before the register and receiver. Rule 42 provides that "When testimony is taken in shorthand, the stenographer's notes must be written out and the written testimony then and there subscribed," etc. Rule 35 provides for testimony "before a United States commissioner or other officer authorized to administer oaths" to be taken *de bene esse;* and it provides that the officers taking such testimony will be

"governed by the rules applicable to trials before registers and receivers." Further rules provide for decisions by the register and receiver, with appeals to the Commissioner of the General Land Office and from the Commissioner to the Secretary of the Interior.

These land contests were not specifically provided for in the Revised Statutes, but are a necessary incident whenever conflicting claims arise between persons claiming to be preemptioners or homesteaders. The practice has received Congressional recognition in the act of May 14, 1880, chap. 89, § 2, as follows:

> In all cases where any person has contested, paid the land office fees, and procured the cancellation of any preemption, homestead, or timber-culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, etc. (Reënacted in Act of July 26, 1892, chap. 251.)

It will be noticed that the rules of the General Land Office do not expressly state that the register and receiver may administer an oath. This is, however, plainly implied. The rules speak of a trial upon which parties are confronted with witnesses, witnesses cross-examined, and testimony taken, and when the testimony is not taken by the register and receiver themselves the rules provide that it must be taken before some other person having authority to administer an oath. The practice, including the administration of oaths, is very ancient.

On these grounds indictments for perjury in land-contest proceedings before registers and receivers in Oklahoma have been sustained in many cases similar to the one

at bar, and on appeal the practice has just been confirmed by a judgment of the supreme court of the Territory of Oklahoma (*Peters* v. *United States*, 33 Pac. Rep., 1031, August 17, 1893). We insert portions of the very careful opinion rendered by that court, through Judge Burford, passing upon the right of trial courts to take judicial notice of the Land Office rules as well as upon the construction and force of the rules themselves.

> In support of the demurrer to the indictment it is contended that there is no law of the United States under which this prosecution can be maintained. It is contended that the case presented by the indictment does not come within the provision of section 5392, Rev. St., U. S., and that section 5 of the act of 1857 is repealed. At common law, in order to constitute the crime of perjury, it was necessary that the alleged false testimony should have been given before a competent judicial tribunal, having jurisdiction of the parties to and the subject-matter of the action or in the course of justice. Our statute is much broader and more comprehensive, and makes false swearing punishable as perjury when committed by a person who, having taken an oath before a competent tribunal, officer, or person in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true. (Rev. St., U. S., § 5392.) It is not necessary under this statute that the false testimony should be given in a judicial proceeding, but if the oath is taken before a competent tribunal, offi-

cer, or person, in any case in which a law of the United States authorizes an oath to be administered, and the matter sworn to is material and false, it is perjury. In this case the oath administered by the receiver of the United States Land Office was authorized to be administered by a law of the United States. "The register or receiver is authorized, and it shall be their duty, to administer any oath required by law or the instructions of the General Land Office, in connection with the entry or purchase of any tract of public lands." Id., §2246.

The rules of the General Land Office, of which the courts take judicial knowledge, and which need not be pleaded or proved, require that, where a contest is filed in the local land office against an entry or other filing, the register and receiver shall set a day for trial, notify the contestee of the time and place of hearing, and on the day set for trial take the testimony of all witnesses present and reduce the same to writing, allow opposing claimants to confront and cross-examine witnesses, and exclude no testimony offered unless it be obviously irrelevant. Rules approved August 13, 1885. (4 Dec. Dep. Int., 35.) The rules require the testimony of witnesses in contest cases to be taken and reduced to writing by the officers of the land office. Testimony can not be taken without administering an oath to the witness. Bouvier defines "testimony" as follows: "The statement made by a witness under oath or affirmation." (2 Bouv. Law Dict., 589.) The authority to take testimony carries with it the power and authority, as well as the requirement, to administer oaths to the witnesses. "It is a general principle of law in the construction of all powers of this sort that, where the end is required, the appropriate means are given." (*U. S.* v. *Bailey*, 9 Pet., 238.) The Secretary of the Interior is charged with the supervision of public

business relating to the public lands. (Rev. St. U. S., § 2478.) The Commissioner of the General Land Office is authorized to perform, under the direction of the Secretary of the Interior, all executive duties pertaining to the sale and survey of the public lands. (*Id.*, § 453.) The commissioner is also empowered, under the direction of the Secretary of the Interior, to enforce and carry into execution by appropriate rules and regulations all the provisions of the statute in reference to public lands. (*Id.*, § 2478.) These rules and regulations, when adopted, approved, and put in force by the Interior Department, have all the force and effect of a law of the United States.

It has been uniformly held that the heads of the Executive Departments may, with the approval of the President, establish rules and regulations in execution of, or supplementary to but not in conflict with, the statutes defining their powers or conferring rights upon others, and when so adopted such rules and regulations have the force and effect of law. (*U. S.* v. *Symonds*, 120 U. S., 46; 7 Sup. Ct. Rep., 411; *U. S. Bailey*, 9 Pet., 238; *U. S.* v. *Eliason*, 16 Pet. 291; *Aldridge* v. *Williams*, 3 How., 9; *Gratiot* v. *U. S.*, 4 How., 80; *Ex parte Reed*, 100 U. S., 13; *Smith* v. *Whitney*, 116 U. S., 181; 6 Sup. Ct. Rep., 570; *U. S.* v. *Boggs*, 31 Fed. Rep., 337; *U. S.* v. *Eaton*, 144 U. S., 677, 12 Sup. Ct. Rep., 764.) The courts take judicial notice of the rules and regulations of the Executive Departments of the Government promulgated by authority of law. (*U. S.* v. *Hearing*, 26 Fed. Rep., 744; *Fisher* v. *Hallock*, 50 Mich., 463; 15 N. Y. Rep., 552; *U. S.* v. *Williams*, 6 Mon., 379; 12 Pac. Rep., 851; *Low* v. *Hanson*, 72 Me., 104; 12 Amer. and Eng. Enc. Law, 153.) The courts will take judicial notice of the rules and regulations of the General Land Office. (*U. S.* v. *Hearing*, 26

Fed Rep., 744; 12 Amer. and Eng. Enc. Law, 153.) The conclusion necessarily follows, deducible from the statutes of the United States, the rules and regulations of the General Land Office, and the adjudications of the court of highest resort in the nation, that prosecutions for perjury may be maintained under section 5397, Rev. St. U. S., for false swearing in the United States land offices.

In the case of *United States* v. *Bailey* (9 Pet., 238) the Supreme Court of the United States had under consideration the question whether or not the crime of perjury could be based upon an oath required by a rule of the Treasury Department. It was admitted that there was no statute of the United States requiring such oath to be taken, but there was a statute making it perjury to swear falsely in support of any claim against the United States. The statute defined the offense, and the question presented for determination of the court was whether or not the oath was administered by one authorized by a law of the United States. The court sustained the conviction upon the ground that the rule of the Treasury Department permitting oaths of the character required to be made before a justice of the peace was a reasonable regulation and within the powers of the Secretary of the Treasury to protect the Government from fraud. This case has never been repealed, but has been often quoted and approved. It might seem that the later case of *United States* v. *Eaton* (144 U. S., 677; 12 Sup. Ct. Rep., 764) is in conflict with the rule in the *Bailey* Case, but a close examination of the case will reveal a material distinction. In the *Eaton* Case, *supra*, the defendant was indicted and tried for failure to keep certain books required to be kept by a rule or regulation of the Treasury Department. There was no law of the United States making

it criminal to fail to keep such books, and hence the court held that an offense could not be created by a rule of the Department, or that the failure to do an act required by a rule or regulation would not subject the offender to criminal punishment under other provisions of the statute. In the case at bar the crime of perjury or false swearing is defined and the punishment prescribed by statute, and the rules of the General Land Office in no sense create the offense or attempt to make an act punishable not otherwise criminal, viz, false swearing. The act of taking the oath is but one of the material ingredients, and when it is shown to have been administered by a person authorized to administer oaths in such cases in a matter in which an oath is authorized, that ingredient of the offense is complete. We think this class of cases comes squarely within the rule announced by the Supreme Court in the *Bailey* Case.

After referring to certain provisions relating solely to the Territorial courts of Oklahoma, the court discusses the Crimes Act of March 3, 1857, chapter 116, as follows:

It is earnestly contended by counsel for appellant that the indictment in this case can only be held sufficient under section 5 of the act of March 3, 1857 (11 Stat., 250), and as they further contend that said section is repealed by sections 5595 and 5596 of the Revised Statutes, it is insisted that the demurrer to the indictment should have been sustained. As to whether section 5, supra, is still in force is a question upon which the courts of the country seem to be divided. Section 5392, Revised Statutes, United States, defining the crime of perjury, was adopted and became a law in 1790. It was evidently found to be insufficient to embrace all cases of false swearing, and to meet and provide a punishment for a certain class

of special cases that might arise in the United States land offices. Congress, in 1857, passed an act which was entitled "An act in addition to an act more effectually to provide for punishment of certain crimes against the United States, and for other purposes." This act is composed of five sections. 1, 2, and 3 are carried forward and incorporated into the Revised Statutes as sections 5341, 5342, and 5343, respectively. Section 5 was omitted from the revision, and is as follows:

"SEC. 5. *And be it further enacted*, That in all cases where any oath, affirmation, or affidavit shall be made or taken before any register or receiver, or either or both of them, of any local land office in the United States, or any Territory thereof, or where any oath, affirmation, or affidavit shall be made or taken before any person authorized by the laws of any State or Territory of the United States to administer oaths or affirmations or take affidavits, and such oaths, affirmations, or affidavits are made, used, or filed in any of the said local land offices, or in the General Land Office, as well in cases arising under any or either of the orders, regulations, or instructions concerning any of the public lands of the United States, issued by the Commissioner of the General Land Office, or other proper officer of the Government of the United States, as under the laws of the United States, in any wise relating to or affecting any right, claim, or title of any contest therefor to any of the public lands of the United States, and if any person, or persons, shall, taking such oath, affirmation, or affidavit, knowingly, willfully, or corruptly swear or affirm falsely, the same shall be taken and deemed to be perjury, and the person or persons guilty thereof shall, upon conviction, be liable to the punishment prescribed for that offense by the laws of the United States." (11 Stat., 250.)

This section is much broader and more comprehensive than section 5392, and many acts that were theretofore not punishable were by its provisions made criminal, and the punishment prescribed for perjury made applicable thereto.

An examination of the act of 1857 discloses the fact that each of its sections relates to a different subject, and each is independent and complete within itself. Section 5 repeats the enacting clause, and is as complete within itself as if it stood separate and alone, and is to all intents and purposes an independent and complete act. It did not have the effect to repeal the act of 1790, defining the crime of perjury, for the reason that the act of 1790 (now section 5392) was general in its terms, while the act of 1857 was special in its provisions and application. There has been no subsequent legislation which directly or by implication repeals the act of 1857, further defining false swearing, unless it is repealed by the failure of the revision committee to incorporate it in the Revised Statutes, or by the terms of the provisions of title LXXIV, Revised Statutes. The intention of Congress as to repeal of prior statutes, by the provisions of title LXXIV, is to be determined by the language employed to indicate their purpose and the objects to be attained. The revisers were not authorized or empowered to make any changes in the then existing laws, or to omit any laws of a general nature. The purpose of the revision, as gathered from the law authorizing same, was to bring forward and incorporate in one volume and under appropriate heads and titles all the laws in force at the time. Title LXXIV of the Revised Statutes was evidently prepared by the revisers, and submitted with their work, as necessary for its completion. Section 5594 of this title is declaratory

of the scope of the Revised Statutes, and shows that the purpose was to embrace all the statutes of the United States that were general and permanent in their character; and this section, construed in connection with section 5595, clearly demonstrates that it was not the purpose of Congress to have omitted, or to repeal by this act, any law of a permanent or general nature which had not been previously repealed or superseded by a subsequent act.

Section 5596 provides: "All acts of Congress, passed prior to said first day of December, one thousand eight hundred and seventy-three, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof, all parts of such acts not contained in such revision having been repealed or superseded by subsequent acts, or not being general and permanent in their nature: *Provided,* That the incorporation into said revision of any general and permanent provision taken from an act making appropriations, or from an act containing other provisions of a private, local, or temporary character, shall not repeal or in any manner affect any appropriation, or any provision of a private, local or temporary character contained in any of said acts, but the same shall remain in force, and all acts of Congress passed prior to said last-named day, no part of which are embodied in said revision, shall not be affected or changed by its enactment."

The purpose of this section is to repeal but one class of laws, and it is explanatory of the reasons for such repeal. The entire section would seem to have been unnecessary as affecting the validity of any laws; and, while it contains the repealing provisions, it also discloses the purpose of Congress, and gives as a reason for repealing a certain class of abrogated laws that they had already been repealed or superseded

by subsequent statutes. If this was the object of the revision and the purpose of Congress in adopting title LXXIV, then it can not be contended with reason that section 5 of the act of 1857 is repealed, for, as before stated, there had been no subsequent legislation prior to the adoption of the Revised Statutes, which repealed or superseded its provisions. This section is special in its application and permanent in character, and, standing as an independent statute, complete within itself, it may stand alone without the aid of any other statute or part of statute; and as no part of it can be said to be embraced in any part of said revision, and there is no section in the Revised Statutes properly and completely applicable thereto, and hence none to be in force in lieu thereof, it must be yet in force, and was, no doubt, omitted from the revision by inadvertence and oversight.

It is a very necessary and wise provision of law. It makes many acts of false swearing criminal which would not otherwise be punishable, and the tendency of the times, as evidenced by the legislative enactments of modern times, is to broaden, rather than narrow, the scope of our criminal statutes defining and punishing the many acts of false swearing.

Section 5392 defines perjury generally, and is general in its application, while section 5, act 1857, is specially applicable to cases of making false affidavits, or giving false testimony in or to be used in land offices, in connection with the disposal of public lands. They are concurrent statutes, not in conflict, and both in force, and a prosecution may be maintained under either. A conviction in the case at bar may be sustained under either statute if the proceedings are otherwise regular and conform to law. And there was no error in overruling the demurrer for the reason that there was no law authorizing the proceedings.

Whether this act of 1857 is or is not repealed involves a very important general question. Indictments under the act have been recently sustained by Mr. Justice Brewer in *Babcock* vs. *United States* (34 Fed. Rep., 873, 876), and by the Oklahoma supreme court in *Fisher* vs. *United States* (1 Okl., 252, 257). Judge Toulmin holds to the contrary in *United States* vs. *Bedgood* (49 Fed. Rep., 54).

The question is whether the word "acts," in section 5596 of the Revised Statutes, refers only to entire statutes bearing separate chapter numbers, or whether a "chapter" consisting of several totally distinct enactments in different sections may be regarded as containing different "acts" for this purpose.

The latter view was taken in *The Montana* (22 Fed. Rep., 715, 729), cited by plaintiffs in error. Mr. Justice Blatchford there says as to a proviso in section 1 of an act of March 3, 1851, concerning the liability of ship-owners: "But that proviso is not reenacted in the Revised Statutes, and as a portion *of the section* containing it is embraced in a section of the revision, the proviso is repealed by force of section 5596." A contrary opinion was expressed, *obiter*, by Mr. Justice Strong in *United States* vs. *Claflin* (97 U. S., 546, 548), and by Chief Justice Waite in *United States* vs. *Le Bris* (121 U. S., 278, 280).

We have, however, a clear Congressional recognition of the fact that the fifth section of the act of 1857 has not been repealed, in the timber-culture act of June 14, 1878, ch. 190, § 6, as follows:

> That the fifth section of the act entitled "An act in addition to an act to punish crimes against the United

States, and for other purposes," approved March 3, 1857, shall extend to all oaths, affirmations, and affidavits required or authorized by this act.

But assuming that the act of 1857 is repealed *in toto*, then the indictment and conviction are still good under the Revised Statutes if regulations of the General Land Office have the force of law, if they can be judicially noticed, and if they authorize the administration of oaths.

On the former point there can be no doubt in view of the decisions as to regulations of other departments of the Government (*Gratiot* v. *United States*, 4 How., 80, 117; *Ex parte Reed*, 100 U. S., 13, 22; *United States* v. *Bailey*, 9 Pet., 238; *United States* v. *Curtis*, 107 U. S., at page 675; *United States* v. *Boggs*, 31 Fed. Rep., 337, and other cases cited by Judge Burford, *supra*). It is respectfully submitted that the *Bedgood Case*, 49 Fed. Rep., 54, cited to the contrary, is not well founded.

Judicial notice of the general printed regulations of the General Land Office is authorized by the principles of law in that regard, especially as they are expressly referred to in section 2246 of the Revised Statutes. Matters far less generally known and clearly ascertainable are constantly noticed by this and other courts.

Among similar regulations, of which it is held that judicial notice should be taken, are the regulations of the Treasury Department (*Low* v. *Hanson*, 72 Me., 104); and proclamations of the President (*Armstrong* v. *United States*, 13 Wall., 154; *Jenkins* v. *Collard*, 145 U. S., 546, 560–1). Under these circumstances the ruling in this case and in *United States* v. *Hearing*, 26 Fed. Rep., 744, that the Land Office regulations are to be judicially

noticed, seems more consonant with the authorities than the contrary ruling of Judge Toulmin in *United States* v. *Bedgood*, 49 Fed. Rep., 54.

The courts may judicially notice the general course of business in the General Land Office (*Fisher* v. *Hallock*, 50 Mich., 463, 465), or even the universal practice of banks (*Merchants' Bank* v. *Hall*, 83 N. Y., 338, 345) and railroad companies (*Isaacson* v. *New York Central R. R. Co.*, 94 N. Y., 278), and shippers (*Slocovich* v. *Insurance Co.*, 108 N. Y., 56). See also *Gibson* v. *Stevens* 8 How., 384; *Phillips* v. *Detroit*, 111 U. S., 604.

On the construction of the Land Office regulations we desire to add nothing to the discussion by Judge Burford above quoted. A mere technical construction would nullify a very ancient departmental practice and nullify every oath in every land contest up to this date.

III AND IV.

These assignments of error relate to the admission of the affidavit and notice of contest which commenced the proceedings in which the perjury was committed. The reason for the objection is set forth in the bill of exceptions (p. 28) as follows:

> First, that said affidavit does not conform to the indictment, etc., and did not prove the issue in the indictment, to wit, that the issue brought in said local land office as to whether said Anton Caha entered upon and occupied any of said lands prior to 12 o'clock noon of April 22, 1889, whereas said instrument so offered shows that the issues being tried and which was tried in said land contest case

was, first, whether or not the said Thomas Burch made prior settlement on the tract of land in controversy prior to the settlement of said Anton Caha; and second, whether the said Anton Caha had entered the Oklahoma country prior to 12 o'clock noon of April 22, 1889, and not whether Anton Caha had entered upon and occupied *any of said land in* said Oklahoma country prior to," etc.

There is no real variance, however. The issue was not, as stated in the bill of exceptions, whether Thomas Burch "made prior settlement," but whether he "was the only prior *bona fide* settler." In other words, it was conceded in the proceedings that Caha reached the land first, but the *bona fide* character of his proceedings was attacked. There was only one issue in the land contest proceedings, namely, whether Caha, having entered Oklahoma before noon of April 22, 1889, was acting *mala fide* in any settlement that he might make. This claim of variance seems to have been another means taken of raising the point which has since been disposed of in *Smith* v. *Townsend* (*supra*).

V, VI.

These assignments of error raise again questions which have been discussed under II *supra*.

VII.

The motion in arrest of judgment merely raises again the first objection made by the demurrer to the indictment. (I, *supra*.)

VIII.

There being no legal objection to the verdict, there can be no error in awarding judgment upon it.

Plaintiff in error attempts to bring in, under this general assignment of error in the judgment, an objection to the verdict on the ground that the record fails to recite his presence on the second day of the trial, or to recite with absolute clearness his presence when sentenced; and that: "At common law no judgment of corporal punishment could be pronounced against a man in his absence." (*Ball* v. *United States*, 140 U. S., 118, 129.)

Since that decision Rule 35 has been adopted, requiring particularized assignments of error. Had error been assigned on that ground, doubtless the defect would have been at once remedied by *nunc pro tunc* order, as doubtless the prisoner was present. Hence the rule should be enforced.

IX, X.

Neither of these assignments raise questions cognizable in this court.

It is respectfully submitted that the judgment should be affirmed.

EDWARD B. WHITNEY,
Assistant Attorney-General.

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IN THE

Supreme Court of the United States.

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THE UNITED STATES,
DEFENDANT IN ERROR.

No. 1001.

Supplemental Brief for Plaintiff in Error.

W. W. DUDLEY,
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Of Counsel.

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The court below erred in giving the jury the instruction set out in the Record. Doubtless this instruction was predicated on sec. 2246, R. S. U. S., declaring that the "register ~~and~~ receiver is authorized, and it shall be their duty, to administer any oath required by law or the instructions of the General Land Office, in connection with the entry or purchase of any tract of the public lands."

We submit that the oath to a witness in a land-contest case is not an oath "in connection with the entry or purchase of any tract of public lands." That this proceeding had no relation to the purchase of any part of the public lands is too clear for argument. That the oath was not administered in connection with the entry of any tract of the public lands is a proposition best illustrated by a

reference to the affidavit of entry made by Mr. Caha. (See Record, page ——.) So far as his entry was concerned, the officers of the local land office exhausted every power which they had under the law when they administered that oath to him. Upon that oath was predicated his entry, and he thereby became, and thereafter was known to the record as, the entryman.

Subsequently, his rights as entryman were assailed in an affidavit made by Mr. Burch. Notice of this affidavit of contest was served upon Mr. Caha, who thereupon joined issue, and thus there was instituted a proceeding not known to the statutes of the United States, in which there was to be contested and determined the rights of Mr. Caha under the law to that part of the public land claimed by him.

It is charged in the indictment that in this proceeding before the officers of the local land office, and while they were taking testimony with relation to this contest, Mr. Caha committed the crime of perjury. This charge is not bottomed upon the affidavit subscribed by him when he made entry of this tract of land, but upon testimony which the indictment charges that he gave several months afterwards, and during the trial of the land contest. We think it clear that the statute does not describe a land-contest proceeding, or expressly authorize the register or receiver to administer an oath therein, but all other proceedings than the mere entry and sale of land are left subject to "the instructions of the General Land Office." Were there any such instructions from the General Land Office to the register or the receiver? It is averred in the indictment that there were such instructions or regulations, but they are not set out therein; neither were they proven upon the trial. We submit that, as they were neither pleaded nor proven, they were not before the court or jury for any pur-

pose—if any such rules, regulations, or instructions there be—and that the court erred when it gave the instruction referred to, and also in overruling the motions filed by the plaintiff in error subsequent to the time when the Government rested its case.

The guilt of one accused of crime must be proven as charged, and the law presumes him innocent until his guilt shall have been established beyond a reasonable doubt. The accused is entitled to the protection of the rule, that the best evidence shall be produced by the Government. Clearly this rule would require the Government to produce either the original rules, regulations, or instructions, or, at least, duly certified copies thereof.

In *U. S.* v. *Bailey* (9 Pet. 238), the District Attorney, recognizing the rule we have stated, "gave evidence conducing to prove that" * * * "the Secretary of the Treasury did establish" certain regulations, "and that the said regulations have been ever since acted on at the Department," etc. The instructions at the Treasury Department thus being in the Record, were considered by this court, and it was held that the Secretary of the Treasury possessed the power to make such regulations, and that the officer taking the oath was duly authorized so to do.

In *U. S.* v. *Bedgood* (49 Fed. Rep. 54), in which perjury was predicated upon regulations supposed to have been issued by the Commissioner of the General Land Office, it was said: "The court does not judicially know what such regulations are, or of any usage under them, and cannot know them, or decide what the effect of them is, until they are shown by proof, and such proof cannot be taken or considered under a demurrer to the indictment."

In *Palmer* v. *Aldridge* (16 Barb. 131), where the Canal Board had statutory authority to make rules and regulations, it was held, by the Supreme Court, that they should

have been incorporated into the case, and that the court could not take judicial notice of their existence or character.

And in *Hensley* v. *Tarpey* (7 Cal. 288) it is held that courts cannot take judicial notice of the rules adopted for the regulation of the various departments of the Federal Government, nor of the rules of the Surveyor-General of the United States.

And in *Moore* v. *Worthington* (2 Duv. (Ky.) 307) it is held that the courts will not take judicial notice of the regulations of the Treasury Department of the United States.

In the foregoing cases, the officers or departments referred to had statutory power to make and promulgate rules and regulations for the government of subordinate officers and the public in the transaction of the official or departmental business. It cannot be doubted that military officers, in time of war, have the power to make orders or regulations for the observance of those living in the districts or regions under their command, but it is held in *Johnson's Trustee* v. *Wilson's Admr.* (29 Grat. 379) and *Burke* v. *Miltenberger* (9 Wall. 519) that the Court would not take judicial notice of such orders, and that they must be proven as other facts.

And in *Dale* v. *Wilson* (16 Minn. ——) the doctrine has been carried to the extent of deciding that, while courts will take judicial notice of the authority conferred by a treaty upon the President of the United States, with reference to public lands, yet they will not take notice of the fact that he has exercised the authority so given him.

In view of this reasoning, supported by such a weight of authority, we respectfully submit that the court below erred in so instructing the jury, and in overruling such of the motions as were predicated upon the fact that the rules,

regulations, and instructions, averred in the indictment, were not produced in evidence, and that the judgment of the court below ought to be in all things reversed.

W. W. DUDLEY,
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Of Counsel for Plaintiff in Error.

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In the Supreme Court of the United States.

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SUPPLEMENT TO BRIEF FOR DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

ANTON CAHA, PLAINTIFF IN ERROR,
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Defendant in error begs to submit certain additional authorities and considerations on two points discussed in its brief already filed.

I. *As to judicial notice.* In the following authorities, official action in the Department of the Interior was judicially noticed:

In *Knight* v. *United States Land Association* (142 U. S., 161, 169) the following passage is contained in the statement of the case by Mr. Justice Lamar, and is specially noticed in the syllabus:

> These facts * * * are cited in former decisions of this court, statutes of the United States and of the State of California, *and the records of the Interior Department*, of all of which the court can take judicial notice.

In *McDaid* v. *Oklahoma* (150 U. S., 209, 216) the court seems to have taken judicial notice of certain regulations issued by the Secretary of the Interior on June 18, 1890, in execution of his trusts under the act of May 14, 1890; also of a certain further regulation made by him on May 8, 1891, and of his instructions to the Commissioner of the General Land Office, issued July 3, 1891. The fact of judicial notice does not appear on the face of the opinion, but the record does not set forth these regulations or instructions.

In *United States* v. *Shinn* (8 Sawy., 403, 407), Judge Deady judicially noticed the regulations and decisions of the Land Office on demurrer to an indictment for perjury in a land contest under the timber-culture act.

In *Kirby* v. *Lewis* (39 Fed. Rep., 66, 77), Judge Caldwell says:

> In the preparation of this opinion the court has consulted some public documents embracing official reports and correspondence of public officers of the State and of the United States relating to the swamp lands of the State, and published by authority, that were not formally introduced in evidence. This practice has the sanction of the Supreme Court of the United States.

The leading case cited by Judge Caldwell is *United States* v. *Teschmaker* (22 How., 392, 405), relating to a Mexican land grant in California, where Mr. Justice Nelson says:

> Nor has there been found any approval of the grant by the Departmental Assembly, for those records are extant as found in the Mexican archives.

> These archives are public documents which the court has a right to consult, even if not made formal proof in the case.

These remarks are quoted with approval by the court speaking through Mr. Justice Clifford in *Romero* v. *United States* (1. Wall., 721). See also *Jones* v. *United States* (137 U. S., 202), and cases cited.

In *Heath* v. *Wallace* (138 U. S., 573–4), the court took judicial notice of a ruling of the Secretary of the Interior, as reported in the "Land Decisions," relating to a single piece of real estate, Mr. Justice Lamar saying:

> We think we may take judicial notice of such official statements made by the head of one of the branches of the Executive Department, especially as they relate to the public records under his control.

In these latter cases the court, in the matter of taking judicial notice, goes far beyond anything claimed by us. We ask such notice only of the universal and long-established practice of the registers and receivers of the General Land Office, under the officially printed general regulations approved by the Secretary of the Interior.

II. *On judicial and Congressional recognition and legal force of the Departmental practice.*

The brief filed by us may convey the impression that no land contests are specifically provided for in the Revised Statutes. (Brief, p. 14.) That is erroneous. The acts of September 4, 1841, chapter 17, and June 12, 1858, chapter 154, incorporated in § 2273 of the Revised Statutes, provide for land contests before the register and receiver in cases of preemptions; they do not provide specifically

for a hearing on sworn testimony. The homestead law was not passed till 1862. It contained no similar provision and no such provision has ever been added to it by amendment. But the act of May 14, 1880, quoted in our brief, recognizes the practice in case of homestead entries to be the same as that in the case of preemption entries.

The practice as stated in our brief is ancient and well established in the case of homestead entries, and in fact, dates from the first operation of the homestead act itself. We find it fully recognized in the opinion of Mr. Justice Field in *Lee* v. *Johnson* (116 U. S., 48), from which we quote as follows:

> The plaintiff below, Enos Johnson, on the 17th of April, 1875, entered the land in controversy situated in Emmet County, Mich., under the homestead laws. * * * It appears also that in 1876 * * * Lee complained at the Land Office that Johnson had abandoned the land for more than six months prior to that date; that a contest was thereupon initiated between Johnson and Lee for the right of the land; that the *usual proceedings in such cases* were had before the register *by whom testimony was taken* and forwarded to the Commissioner of the General Land Office. The Commissioner decided in favor of Johnson, but on appeal the decision was reversed by the Secretary of the Interior and the entry ordered to be canceled. * * *
>
> Without going into any detail of *the evidence presented* to the Commissioner and the Secretary of the Interior * * * it is clear that their attention was drawn by it to the character of the settlement of Johnson, etc. * * * While there are no formal pleadings in such cases, it is undoubtedly true, as a general rule, that in contested matters before the land

> department, as in those before the courts, the decision should be confined to the questions raised by the allegations of the respective parties, but this rule has its exceptions. If in any case it appears *from the evidence* that the claim of the complaining or moving party is against public policy or the law, so that in no event could he recover a final judgment or decision, whatever be the nature or extent of the testimony upon the point at issue, the tribunal should not hesitate to dismiss the suit or the proceeding. * * * In the bill of complaint it is alleged that in the *testimony reported by the register* there was an interpolation to the effect that, etc. (See also recognition of same practice under homestead and timber-culture acts by Judge Deady in *United States* v. *Shinn*, 8 Sawy., 403, 407.)

In cases in this court relating to contests between preemptioners under § 2273 (*supra*), it has also been recognized by this court that the contest involved the formal taking of testimony as upon the trial of an action (*Vance* v. *Burbank*, 101 U. S., 514, 519–20; *U. S.* v. *Minor*, 114 U. S., 233, 243); and testimony by its legal definition implies the administering of an oath or affirmation (2 Bouvier Law Diet'y, 15th ed., p. 723); an affirmation for all purposes under the Revised Statutes being the equivalent of an oath. (Rev. Stat., §1.)

The practice has also just received further Congressional recognition in an act approved January 11, 1894, as follows:

> SEC. 1. That no register or receiver shall *receive evidence in*, hear, or determine *any cause pending* in any district land office in which cause he is interested directly or indirectly, etc.

See also Act March 3, 189 ch. 561 § 7 26 Stat p. 1

The regulation of the land office in this regard, being specially authorized by statute, the case is much stronger than the well-known case of *United States* v. *Bailey* (9 Pet., 238), discussed in the briefs filed herein by both parties. In that case the prosecution was for false swearing in verifying a claim against the United States under the *Act of July* 5, 1832, chap. 173 (4 Stat., 563) for liquidating and paying certain debts of the State of Virginia. This act provided:

> That the Secretary of the Treasury be, and he is hereby, directed and required to adjust and settle those claims for half pay of the officers of the aforesaid regiments and corps which have not been paid or prosecuted to judgments against the State of Virginia, etc.

No provisions were made in this statute, or elsewhere, for the verification of claims by oath or affirmation. It was shown by the certificate, however, as stated by the court in its opinion (p. 253):

> That there was evidence at the trial conducing to prove (and for the purpose of the present argument it must be taken as proved) that the Secretary of the Treasury did establish a regulation authorizing affidavits made before any justice of the peace of a State to be received and considered in proof of claims under the act of 1832.

The prosecution was under the *Act of March* 1, 1823, chap. 37, § 3 (3 Stat., 770). The first two sections of this act do not relate to the general accounts of the Government, but to certain accounts of the War Department

pending before the Third Auditor in relation to matters prior to 1815; § 3 is as follows:

> *And be it further enacted*, That if any person shall swear or affirm falsely touching the expenditure of public money, or in support of any claim against the United States, he or she shall, upon conviction thereof, suffer as for willful and corrupt perjury.

Mr. Justice Story, delivering the opinion of the court, stated and discussed the question as follows:

> The solution of the question now before us depends upon this: Whether the oath so administered under the sanction of the Treasury Department is within the true intent and meaning of the act of 1823. * * * That act does not create or punish the crime of perjury, technically considered, but it creates a new and substantive offense of false swearing, and punishes it in the same manner as perjury. The oath, therefore, need not be administered in a judicial proceeding. * * * The policy of the act clearly extends to such a case, and the public mischief to be remedied is precisely the same as if the affidavit had been taken under the express and direct authority of a statute of the United States. And we are of opinion that the Secretary of the Treasury did, by implication, possess the power to make such a regulation, and to allow such affidavits in proof of claims, under the act of 1832. It was incident to his duty and authority in settling claims under that act. * * *
>
> It is a general principle of law, in the construction of all powers of this sort, that where the end is required the appropriate means are given. It is the duty of the Secretary to adjust and settle these claims, and in order to do so he must have authority to

require suitable vouchers and evidence of the facts which are to establish the claim. No one can well doubt the propriety of requiring the facts which are to support a claim, and rest on testimony, to be established under the sanction of an oath. * * * It may be added *that it has been stated by the Attorney-General, and is of public notoriety, that there has been a constant practice and usage in the Treasury Department*, in claims against the United States, and especially of a nature like the present, to require evidence by affidavits in support of the claim, whether the same has been expressly required by statute or not; *and that occasionally general regulations have been adopted in the Treasury Department for this purpose.* Congress must be presumed to have legislated under this known state of the laws and usage of the Treasury Department.

The very circumstance that the Treasury Department had for a long period required solemn verifications of claims against the United States, under oath, as an appropriate means to secure the Government against frauds, without objection, is decisive to show that it was not deemed a usurpation of authority. The language of the act of 1823 should, then, be construed with reference to this usage, etc. [Citing *O'Mealy v. Newell*, 8 East, 364.] * * * Upon the whole, we are of opinion that where the oath is taken before a State or national magistrate, authorized to administer oaths, in pursuance of any regulations prescribed by the Treasury Department, or in conformity with the practice and usage of the Treasury Department, so that the affidavit would be admissible evidence at the Department, in support of any claim against the United States, and the party swears falsely, the case is within the purview of the act of 1823.

It is evident from the long and careful dissenting opinion of Mr. Justice McLean that this case received the fullest consideration from the court. This learned justice accordingly, in *United States* v. *Winchester* (2 McLean, 135), sustained an indictment for perjury on an oath to a preemptioner's affidavit taken by a justice of the peace "under the usage of the Treasury Department." (See also *United States* v. *Ambrose*, 2 Fed. Rep., 556; *United States* v. *Sonachall*, 4 Biss., 425; *United States* v. *Shinn*, 8 Sawy., 403; *Ralph* v. *United States*, 11 Biss., 88.)

In using the phrases "false swearing" and "perjury," Mr. Justice Story did not, of course, intend to intimate any real difference between the two. He simply referred to the statutory language and pointed out that the statutory "false swearing" was, to verifications of claims before the Departments, what perjury at common law was to oaths in court. The two are blended in § 5392 of the Revised Statutes under the general name of "perjury."

In considering the effect of section 5596 of the Revised Statutes, repealing all acts any portion of which is embraced in any section of the revision, it must be remembered that the revision is declared by section 5595 to "embrace the statutes of the United States, general and permanent in their nature, in force on the 1st day of December, 1873."

If, therefore, the act of 1857 is repealed, then this is equivalent to a statutory declaration that "an oath before a competent tribunal * * * or person, in any case in which a law of the United States authorizes an oath to be

administered, that he will testify, * * * or certify truly, or that any written testimony, declaration, * * * or certificate by him subscribed is true," includes the matters formerly covered by that act; and for the purpose of construing the Revised Statutes, so far as they are ambiguous, the act of 1857 may be referred to (*United States* v. *Le Bris*, 121 U. S., 278). "Plainly the word 'case,' as used in the statute, is not to be confined to suits or proceedings strictly in court." (*United States* v. *Volz*, 14 Blatchf., 15.)

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